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In the Supreme Court of the United States

FORD MOTOR COMPANY, *Petitioner*,

v.

DOLORES CLAY, AS ADMINISTRATRIX OF THE ESTATE OF KATHLEEN P. CLAY, ET AL., *Respondents*.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a trial court presented with a motion to exclude expert testimony as unreliable under Federal Rule of Evidence 702 and *Daubert* v. *Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), is required to provide a reasoned explanation on the record concerning its decision to admit or exclude the testimony.

2. Whether a trial court's "broad latitude" to decide "how to determine an expert's reliability" (*Kumho Tire Company* v. *Carmichael*, 526 U.S. 137, 152-153 (1999)) includes the discretion to ignore a clearly applicable *Daubert* factor that points toward the unreliability of an expert's methodology on the ground that the jury can always consider the factor in evaluating the weight of the expert's testimony.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The parties to the proceeding in the court of appeals were:

1. Ford Motor Company;
2. Dolores Clay, as Administratrix of the Estate of Kathleen P. Clay;
3. John D. Strom, as Administrator of the Estate of Christopher J. Strom; and
4. William R. Slonsky.

Pursuant to Supreme Court Rule 29.6, petitioner Ford Motor Company states that it has no parent company, and that no publicly held company holds 10% or more of its stock.

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PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-25a) is reported at 215 F.3d 663. The order of the district court denying Ford's motion *in limine* to exclude the testimony of plaintiffs' expert (App., *infra*, 26a-30a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on June 28, 2000. A timely petition for rehearing was denied on August 15, 2000 (App., *infra*, 86a-87a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

RULES INVOLVED

Federal Rule of Evidence 702 provides:

Testimony by Experts

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

Federal Rule of Evidence 104 provides, in relevant part:

Preliminary Questions

(a) Questions of admissibility generally. Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b).

STATEMENT

This case raises important and recurring questions concerning the "gatekeeping" obligations of federal trial courts engaged in screening expert testimony for admissibility under Rule 702 of the Federal Rules of Evidence and this Court's decisions in *Daubert* v. *Merrell Dow Pharmaceuticals, Inc.*, 509

U.S. 579 (1993), and *Kumho Tire Company* v. *Carmichael*, 526 U.S. 137 (1999). The issues also have a substantial bearing on appellate review of the decision whether to admit such testimony under *General Electric Co.* v. *Joiner*, 522 U.S. 136 (1997). The Court should take this opportunity to resolve substantial conflicts in the circuits in this vitally important area of federal law.

In this product liability action arising out of a single-car accident, the plaintiffs won a multimillion dollar judgment against Ford Motor Company ("Ford") on the strength of their expert's testimony that the accident was caused by design defects in the vehicle. Although Ford raised serious questions about the reliability of the expert's methodology and sought to exclude the testimony under *Daubert*, the trial court summarily rejected Ford's motion, and overruled its renewed objections at trial, without offering *any* explanation of why the expert's testimony was admissible. In affirming, a divided panel of the Sixth Circuit acknowledged that this was a "close case" and that the trial court had failed to explain its rulings, but it inferred from the mere fact that the rulings were made that the trial court had faithfully discharged its "gatekeeping" obligations under *Daubert*. In dissent, Judge Ryan criticized the trial court's actions as "a clear example of a court improperly abdicating its gatekeeping function under *Daubert* * * * and *Kumho*." App., *infra*, 18a.

A. The Accident Underlying This Lawsuit.

On the night of June 18, 1995, William Slonsky, accompanied by three passengers, was driving a Ford Bronco II on Interstate 77 in Ohio. The vehicle had just been repaired after sustaining severe damage in another accident. Slonsky had never previously driven the vehicle; its owner, Sean Lance, who was riding in the front passenger seat, had asked Slonsky to drive because Lance had ingested five tablets of LSD earlier that evening. Slonsky and Lance were wearing seat belts but the two passengers in the back, Kathleen Clay and Christopher Strom, were unbelted. App., *infra*, 2a-3a.

Slonsky was driving 53 to 65 miles per hour when he moved to the right lane to allow a faster car to pass him. Immediately thereafter, the car in front of the Bronco II began decelerating, and Slonsky turned his steering wheel to the left to return to the middle lane. Slonsky testified that he felt the vehicle "jerk" or "overcorrect" to the left. He turned the steering wheel back to the right, perhaps as much as a full revolution, in an unsuccessful attempt to regain control. The vehicle rolled over several times. The unbelted passengers in the back seat both were ejected and died from injuries suffered in the accident. Slonsky and the vehicle's owner suffered only minor injuries. App., *infra*, 2a-3a.

B. The Proceedings in the District Court.

Dolores Clay and John Strom brought suit against Ford on behalf of the estates of their children.[1] Plaintiffs alleged that the Bronco II had a design defect that proximately caused the plaintiffs' injuries. The jury returned a verdict against Ford and awarded plaintiffs $17.5 million in compensatory damages, which was remitted to $10.5 million.

1. *The Testimony of Plaintiffs' Expert.* Plaintiffs relied heavily on the testimony of a single expert witness, Dr. Melvin Richardson, who opined that the accident was caused by design defects in the handling and stability of the Bronco II. Richardson, formerly a professor of engineering, had worked full-time as a litigation consultant since 1985. Although Richardson himself had never designed anything other than an okra picker that was never commercially produced (Pet. C.A. App. 1126-1127), he had testified as an expert in lawsuits alleging that a wide array of items, ranging from aircraft seat

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[1] Ford filed a third-party complaint against Slonsky, seeking indemnification and contribution, and Slonsky brought a counterclaim against Ford. Because Slonsky and the estates of Clay and Strom presented evidence jointly at trial, they are referred to in this petition collectively as "plaintiffs."

belts to lawnmowers to tobacco drying barns, were defective in design. *Id.* at 1253-1254, 1299. Richardson testified that "95%" of his work was on behalf of plaintiffs who were suing corporations and that, until recently, his work required him to give a deposition every 10-14 days. *Id.* at 1249, 1255-1256.

Richardson had never worked in the automotive industry and had never designed an automobile. Pet. C.A. App. 1133. He had never published an article on the handling and stability of vehicles (*id.* at 1251); all of his experience related to that subject was derived from his work as an expert witness (*id.* at 1252). In other cases, Richardson had opined that at least two other vehicles, the Suzuki Samurai and the Jeep Grand Cherokee, also had handling and stability defects. *Id.* at 1250.

At plaintiffs' request, the district court qualified Richardson as an expert in a variety of fields, including not only accident reconstruction but also mechanical engineering, vehicle dynamics, and machine design. App., *infra*, 6a. With regard to accident reconstruction, Richardson testified that his usual methodology consisted of two steps. First, Richardson gathered all available data and information about the accident, including the testimony of those involved in the accident and other witnesses, information about the "vehicles involved" and "their characteristics," information about other "physical * * * objects involved," and data about "the physical area" where the accident took place (including, for example, "what the road is like" and "how it's constructed"). Pet. C.A. App. 1127-1128. Second, Richardson "tak[es] all of the physical and factual information and appl[ies] the standard engineering techniques to that information to determine the most probable sequence of events that took place." *Id.* at 1128; see also *ibid.* (noting that second step would involve, for example, the application of "analytical techniques * * * to determine things such as speed").

In this case, Richardson acknowledged that he had never personally inspected the accident vehicle (relying instead on photographs taken by his son and by the police); had not visited the accident scene until the day before trial (*after* Richardson

had given his opinion in deposition); had been unable, during that 10-15 minute visit, to see the gouge marks from the accident because it was "close to dark" and traffic was heavy on the interstate so he had to remain on the shoulder; and had not, prior to forming his opinions, read the deposition of either Sean Lance (an eyewitness and front seat passenger) or the police officer who prepared the accident report. Pet. C.A. App. 209-210, 231, 1210-1214, 1282-87.[2] Nevertheless, based on his review of police reports and certain witness statements and deposition testimony, Richardson opined that when Slonsky changed lanes the second time, the vehicle turned sideways, started to slide, and then began to roll. *Id.* at 1219. Richardson did not attempt to determine how far Slonsky had turned the steering wheel in his evasive maneuvers; in fact, he did not even consider Slonsky's deposition testimony on that subject. *Id.* at 1299. As Richardson put it, "[w]e just know the vehicle got sideways and then it started flipping." *Ibid.*

Richardson also testified that the Bronco II turned sideways because of a handling defect and then rolled over because of several stability defects. Pet. C.A. App. 1243-1244. With respect to the handling defect, Richardson opined that the use of a rear stabilizer bar on the Bronco II caused "oversteer" (*i.e.*, sliding out of the vehicle on a turn). *Id.* at 1163-1165. As for the stability defects, Richardson first stated that the Bronco II's "stability index" — a figure calculated by dividing the width of the vehicle by the height of its center of gravity — was too low. *Id.* at 1155-1160. In addition, he stated that the design of the twin I-beam suspension caused the front end of the vehicle to elevate on a hard turn, raising the center of gravity (a phenomenon that Richardson called "jacking"). *Id.* at 1142-1145, 1184-1189.

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[2] Ford's expert on accident reconstruction, in contrast, "inspected the actual vehicle and visited the accident site several months before the trial." App., *infra*, 8a.

Richardson formed his opinion that the Bronco II had defects that caused the accident without the benefit of the tests that might have supported that opinion. For example, he did not attempt to determine through testing how the vehicle actually responded to specific driver inputs. Pet. C.A. App. 1259-1260, 1264, 1269-1270. He did not test other similar vehicles to determine whether they performed better. *Id.* at 1339-1340. And he did not demonstrate that the design changes he advocated would have averted the accident. *Id.* at 1350.[3]

2. *Ford's Objections To Richardson's Testimony.* Before trial, Ford filed a motion to exclude Richardson's testimony and requested a hearing under Rule 104 of the Federal Rules of Evidence. Pet. C.A. App. 205-219. Invoking *Daubert*, Ford contended that Richardson's testimony was insufficiently reliable to be admitted under Rules 702 and 703. *Id.* at 209, 212-213. Among other things, Ford argued that Richardson's accident reconstruction testimony was wholly speculative and based on a flawed and inadequate investigation (*id.* at 209-210) and that his opinions concerning the Bronco II's alleged design defects had neither been tested, nor published, nor subjected to peer review (*id.* at 212-213).

In response, plaintiffs did not dispute that Richardson's methodology lacked all of these hallmarks of reliability. Plaintiffs' Response to Defendant's Motion In Limine, at 1-9. Nor did they make any showing (or even claim) that Richardson's techniques were generally accepted in the fields of product design or accident reconstruction. See also *id.* at 4

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[3] Richardson did rely on a computer simulation that Ford ran on a *different* vehicle model, but it merely showed that the wheels of that vehicle *almost* left the ground when the driver performed a rapid series of violent turns on the steering wheel. He also relied on a videotape of another test, again performed by someone else, which showed that the wheels of another version of the Bronco II lifted slightly off the ground when the driver performed radical evasive maneuvers at high speeds. Pet. C.A. App. 1307-1311, 1237-1242.

(acknowledging that "there are engineering or automobile journals that may have published articles on Bronco II rollovers"). Instead, plaintiffs argued primarily that *Daubert* was limited to "scientific" testimony and thus "has nothing to do with this case." *Ibid.* Plaintiffs relied on various cases — including the Sixth Circuit's decision in *United States* v. *Jones*, 107 F.3d 1147, 1158 (6th Cir. 1997) — that were subsequently overruled by this Court in *Kumho*. See also App., *infra*, 5a n.3.

3. *The District Court's Rulings.* The district court rejected Ford's request for a hearing, but stated that it "reserves to itself the possibility of engaging in a brief voir dire" before Richardson testified. App., *infra*, 30a. When plaintiffs moved to qualify Richardson as an expert at trial, the court offered Ford an opportunity to engage in voir dire on his qualifications, but suggested that Ford's questions concerning the foundation for Richardson's opinions "would be best reserved for * * * cross-examination." App., *infra*, 32a. The court allowed Ford to maintain a "continuing objection" to the admissibility of Richardson's opinions on the subject of accident reconstruction. *Id.* at 32a-33a.

At the close of plaintiffs' case in chief, Ford moved to strike Richardson's testimony under *Daubert*. The district court overruled the objection without explanation. App., *infra*, 34a. At the close of all the evidence, Ford moved for a directed verdict on the ground that "Dr. Richardson's testimony regarding the design defect constitutes junk science which this Court should not consider." *Ibid.* The district court overruled this motion as well, again without any explanation. *Ibid.* Finally, Ford argued in its motion for judgment as a matter of law that Richardson's testimony should be disregarded as unreliable. The court once more declined to assess the reliability of the testimony. *Id.* at 37a-38a.

C. The Proceedings in the Court of Appeals.

1. A divided panel of the Sixth Circuit affirmed. App., *infra*, 1a-25a. At the outset, the majority explained that it would

review the district court's decision to admit Richardson's testimony only for abuse of discretion and would reverse "only if we are firmly convinced" that the lower court "erred." *Id.* at 4a (citing *General Electric Co.* v. *Joiner*, 522 U.S. 136 (1997)). The majority emphasized that "deference to the district court's decision 'is the hallmark of abuse of discretion review.'" App., *infra*, 4a (quoting *Joiner*, 522 U.S. at 143).

Turning to the district court's ruling, the court of appeals first observed that, under *Daubert* and *Kumho*, trial courts have a gatekeeping obligation to ensure that all expert testimony is both relevant and reliable. App., *infra*, 4a-5a. Although the majority acknowledged that "the district court did not explicitly recite that Richardson's testimony was relevant and reliable," it nevertheless concluded that the court's rulings on Ford's challenges to the testimony, which "squarely raised the issue of reliability," "indicate that it made that determination." *Id.* at 5a. The majority did not explain how that inference could be reconciled with the fact that plaintiffs' principal response to the *Daubert* challenge in the trial court was to argue that *Daubert* was inapplicable — a position that was consistent with Sixth Circuit law but that was subsequently "overruled" by this Court in *Kumho*. App., *infra*, 5a n.3. The majority also noted that Ford "had a full opportunity to cross-examine Richardson." *Id.* at 9a.

The court of appeals next summarily rejected Ford's critique of Richardson's methodology. After discussing Richardson's background qualifications in considerable detail, the majority explained that Ford had failed to show "how Richardson's failure to inspect the Bronco II or his late visit to the accident site undermine his methodology of accident reconstruction or render his testimony about this particular accident inadmissible." App., *infra*, 8a. The majority also dismissed Ford's critique of Richardson's methods for discerning design defect, stating, for example, that:

> [t]he district court, in its discretion, could have decided that Richardson's failure to test his theories went to the *weight*

> of his testimony regarding defects in the Bronco II, *not to its admissibility*.

Ibid. (emphasis added). Here again, the majority observed that "Ford was able to challenge the testimony regarding the alleged defects in the Bronco II through cross-examination." *Ibid.*

On the basis of this analysis, the Sixth Circuit upheld the district court's unexplained rulings because it was not "firmly convinced that the court abused its discretion by allowing Richardson to testify." App., *infra*, 4a. The court acknowledged, however, that this was "a close case." *Ibid.*

2. Judge Ryan dissented, observing that "this case presents a clear example of a court improperly abdicating its gatekeeping function under *Daubert* * * * and *Kumho*." App., *infra*, 18a. (citations omitted). Judge Ryan agreed that the district court was not required to conduct a *Daubert* hearing, but stated that it *was* obliged to make an initial assessment of relevance and reliability. Here, there was no such "initial assessment, and indeed * * * no express assessment at any time as to the reliability of Dr. Richardson's testimony." *Id.* at 20a. In Judge Ryan's view, "[t]he absence of such determination signals the trial court's failure to perform its gatekeeping function," which "alone constitutes an abuse of discretion." *Ibid.* Judge Ryan criticized the majority for improperly "substituting its own determination of reliability for that of the district court." *Ibid.*

Judge Ryan also disputed the majority's suggestion that it would have been within the district court's discretion to find Richardson's testimony reliable. *Daubert* and *Kumho*, Judge Ryan explained, require the proponent of expert testimony to produce "evidence that the methodology underlying the expert's conclusion is 'good science' or 'good engineering.'" App., *infra*, 23a. But the record here was "absolutely devoid of any indication that the process or methodology Dr. Richardson employed in reconstructing the accident" met that standard. *Id.* at 21a. Similarly, Judge Ryan found the record to be "devoid of any evidence showing that Dr. Richardson employed

recognized, reliable scientific or engineering methodology in reaching his conclusion that the Bronco II has handling and stability defects." *Id.* at 22a.

Indeed, according to Judge Ryan, there was no evidence that Richardson's methodology satisfied a *single one* of the indicia of reliability set forth in *Daubert* and *Kumho.* See App., *infra*, 21a-24a (noting that plaintiffs had failed to suggest any other considerations that pointed toward the reliability of Richardson's methodology). Judge Ryan was particularly troubled by Richardson's failure to test his theories, explaining that, "[a]t a bare minimum, *Daubert's* first factor – 'testing' or 'falsifiability' – will generally require an engineer to test his hypothesis of design defect." *Id.* at 22a (emphasis omitted).

Finally, Judge Ryan took issue with the majority's conclusion that the district court "could have decided" that the failure to test went to the weight, rather than the admissibility, of the testimony (App., *infra*, 24a) and with the majority's heavy reliance on Ford's "opportunity to cross-examine Dr. Richardson" (*id.* at 25a). He observed that it was unclear "how this point is relevant," because the opportunity to cross-examine an expert cannot "properly substitute for a trial court's gatekeeping function." *Ibid.*

REASONS FOR GRANTING THE PETITION

This case presents the Court with the opportunity to clarify significant aspects of the trial court's obligation in evaluating the admissibility of expert testimony, including (1) the procedures that must be followed by the trial court in resolving challenges to expert testimony, and (2) the limitations on the trial court's discretion to decide *how* to determine admissibility. In *Daubert* and *Kumho*, this Court held that trial courts must act as "gatekeepers" with respect to expert testimony, ensuring that it meets the standards of FRE 702 before it may be presented to the jury. To perform that critically important function, courts must undertake a multifaceted analysis that focuses on whether the specific methodology employed by an expert witness is

reliable and whether the expert's testimony "fits" the case at hand. In *Joiner*, this Court made clear that the trial court's determination of admissibility should be reviewed for abuse of discretion.

As several courts of appeals have recognized, it is implicit in the Court's rulings that the analysis required by *Daubert* and *Kumho* must be undertaken *on the record.* Otherwise, it is simply impossible to tell whether the trial court has diligently conducted the required analysis or instead has impermissibly abandoned its gatekeeping role. Moreover, unless the trial court explains its rationale, it is impossible to determine whether its ultimate ruling rests on an error of law or otherwise constitutes an abuse of discretion. See *Koon* v. *United States*, 518 U.S. 81, 100 (1996) ("A district court by definition abuses its discretion when it makes an error of law."). For these reasons, the Tenth Circuit is "convince[d]" of "the absolute necessity of district court findings on the record." *Goebel* v. *Denver and Rio Grand W. R.R. Co.*, 215 F.3d 1083, 1088 (10th Cir. 2000).

The Sixth Circuit, by contrast, has ruled that a trial court need not explain its reasoning when applying "the exacting standards of reliability" that expert testimony "must meet" under *Daubert*. *Weisgram* v. *Marley*, 120 S. Ct. 1011, 1021 (2000). In the Sixth Circuit's view, the mere fact that a trial court has decided to admit or exclude expert testimony in the face of a challenge to its admissibility under Rule 702 is a sufficient basis for inferring that the trial court has discharged its gatekeeping obligations. That approach, if permitted to stand, would invite district courts to avoid the "subtle and sophisticated determinations" (*Joiner*, 522 U.S. at 147 (Breyer, J., concurring)) required by Rule 702 and would significantly impair the ability of federal appellate courts to carry out their reviewing responsibilities under *Joiner*.

To make matters worse, the Sixth Circuit did not stop at excusing the district court's unwarranted failure to offer any explanation of its ruling. It compounded that error by holding that the trial court would have been free to ignore a relevant

Daubert factor on the ground that the factor could always be considered by the jury — a rationale that amounts to nothing less than a license to ignore *Daubert* altogether. The court of appeals' holding is flatly inconsistent with this Court's direction, in *Kumho*, that a "trial court *should consider* the specific factors identified in *Daubert* where they are reasonable measures of the reliability of the expert testimony." 526 U.S. at 152 (emphasis added). By relying on this flawed rationale, the majority was also able to avoid giving any serious consideration to the failure of plaintiffs' expert to satisfy even a single one of the *Daubert* factors. Thus, there can be no assurance that *any* federal judge — apart from Judge Ryan, who discussed the *Daubert* factors in detail — engaged in any form of meaningful gatekeeping in this case.

I. THE SIXTH CIRCUIT'S HOLDING THAT A TRIAL COURT IS NOT REQUIRED TO MAKE EXPRESS FINDINGS UNDER *DAUBERT* CONFLICTS WITH THE DECISIONS OF OTHER CIRCUITS AND IS WRONG

A. The *Daubert* Framework

In *Daubert* v. *Merrell Dow Pharmaceuticals*, *supra*, this Court held that the Federal Rules of Evidence require trial courts to "ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable." 509 U.S. at 589. To qualify for admission under Rule 702, an expert's opinion must "have a reliable basis in the knowledge and experience of his discipline." *Id.* at 592. Thus, "[f]aced with a proffer of expert scientific testimony, * * * the trial judge *must determine at the outset*, pursuant to Rule 104(a)," whether the testimony is admissible. *Ibid.* (emphasis added).

The Court ruled in *Daubert* that, when expert testimony is proffered, the trial court must make "a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue."

509 U.S. at 592-93 (emphasis added). The "focus" of this preliminary assessment "must be solely on principles and methodology, not on the conclusions that they generate." *Id.* at 595. The Court identified several specific factors to be considered in making the admissibility determination, including (1) whether the theory or technique upon which the expert relies "can be (and has been) tested"; (2) whether it "has been subjected to peer review and publication"; (3) the technique's "known or potential rate of error"; (4) "the existence and maintenance of standards controlling the technique's operation"; and (5) whether the theory or technique has been generally accepted. *Id.* at 593-94. At the same time, the Court emphasized that this list of reliability factors was not intended to be exhaustive. See *id.* at 593.

In *General Electric Co.* v. *Joiner*, *supra*, the Court held that "abuse of discretion is the proper standard by which to review a district court's decision to admit or exclude" expert testimony. 522 U.S. at 146. The Court also instructed that "nothing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence that is connected to existing data only by the *ipse dixit* of the expert." *Ibid.* In a separate concurrence, Justice Breyer observed that the gatekeeping obligation under *Daubert* "will sometimes ask judges to make subtle and sophisticated determinations," but cautioned that "the difficulty of the task" does not "excuse the judge from exercising the 'gatekeeper' duties." *Id.* at 147-48 (Breyer, J., concurring). "To the contrary," Justice Breyer explained, "when law and science intersect, those duties often must be exercised *with special care*." *Id.* at 148 (emphasis added).

Finally, the Court elaborated on the trial court's gatekeeping obligations in *Kumho Tire Company* v. *Carmichael*, *supra*, holding that this duty applies "not only to testimony based on 'scientific' knowledge, but also to testimony based on 'technical' and 'other specialized' knowledge." 526 U.S. at 141. The Court again emphasized the "importance of *Daubert*'s

gatekeeping requirement," noting that its essential objective is "to make certain that an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field." *Id.* at 152. And the Court reiterated that the inquiry required is a "flexible" one in which the trial court "must have the same kind of latitude in deciding *how* to test an expert's reliability, and to decide whether or when special briefing or other proceedings are needed to investigate reliability, as it enjoys when it decides whether or not that expert's relevant testimony is reliable." *Ibid.* This broad latitude allows the trial court "to avoid unnecessary 'reliability' proceedings in ordinary cases where the reliability of an expert's methods is properly taken for granted, and to require appropriate proceedings in the less usual or more complex cases where cause for questioning the expert's reliability arises." *Ibid.*[4]

In both *Joiner* and *Kumho*, the Court went on to consider whether the trial court had properly excluded the expert testimony at issue, concluding in each case that there had been no abuse of discretion. See 522 U.S. at 143-47; 526 U.S. at 153-158. In so doing, the Court provided the lower courts with a valuable illustration of the kind of careful and rigorous review of methodological reliability that *Daubert* requires. Thus, in *Joiner*, the Court, after faulting the proponent of the expert testimony for failing to "reply to" the "criticisms" raised by the defendant concerning the animal and epidemiological studies on which the expert relied, proceeded to discuss the problems inherent in each of these studies. 522 U.S. at 143-147. And in

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[4] In a concurring opinion, Justice Scalia, joined by Justices O'Connor and Thomas, added that the trial court's "discretion in choosing the manner of testing expert reliability" is not "discretion to abandon the gatekeeping function" or "to perform the function inadequately." 526 U.S. at 158-159. Rather, the trial court has "discretion to choose among reasonable means of excluding expertise that is fausse and science that is junky." *Ibid.*

Kumho, the Court carefully reviewed the lower court's reasoning concerning how the *Daubert* factors, and other indicia of reliability, applied to the expert at issue. In both *Joiner* and *Kumho*, it is difficult to imagine how this Court could have undertaken to review the trial court's ruling for abuse of discretion if there had been no explanation for that ruling.

B. The Circuits Are In Conflict Over The Trial Court's Obligation To Make Findings Under *Daubert*

In light of *Daubert*, *Joiner*, and *Kumho*, the trial court's gatekeeping function is uniformly recognized. The courts of appeals disagree, however, concerning the trial court's obligation, in performing that function, to state its reasons for admitting or excluding expert testimony. In the decision below, the Sixth Circuit held that a trial court need not provide any explanation for concluding that the *Daubert* standards have been satisfied or that the testimony of the challenged expert is based on a reliable methodology. Indeed, the court of appeals concluded that it would *infer* from the mere fact that the district court ruled on Ford's motion *in limine* and other challenges to Richardson's testimony that the court had faithfully executed its gatekeeping responsibilities. As we next explain, the Sixth Circuit's lax approach conflicts with decisions of at least three other circuits, all of which require the trial court to provide some determination on the record concerning the relevance and reliability of expert testimony.

1. The Tenth Circuit has squarely ruled that the trial court must make findings on the record before it rejects a challenge to the admission of expert testimony. In the Tenth Circuit, the admission of disputed expert testimony in the absence of such findings is, *per se*, an abuse of discretion necessitating a new trial.

In *United States* v. *Velarde*, 214 F.3d 1204 (10th Cir. 2000), for example, the defendant was convicted of aggravated sexual abuse of a child based on the expert testimony of a

pediatrician and a child psychologist. The trial court refused the defendant's request for a *Daubert* hearing on the ground that the proffered testimony was not "new or novel" (*id.* at 1208), and it made no findings on the record concerning the reliability or relevance of the expert testimony.

The Tenth Circuit reversed, ruling that the trial court had abused its discretion by admitting the testimony without expressly conducting a *Daubert* analysis. Although the court of appeals "recognize[d] that the trial court is accorded great latitude in determining how to make *Daubert* reliability findings before admitting expert testimony," it held that "*Kumho* and *Daubert* make it clear that the court must, on the record, make some kind of reliability determination." *Velarde*, 214 F.3d at 1209. Because the record "revealed no such reliability determination," even "when *Kumho* was specifically called to the court's attention" (*ibid.*), the Tenth Circuit concluded that the trial court "abused its discretion when it admitted the testimony." *Id.* at 1211.[5]

The Tenth Circuit applied the same rule in *Goebel* v. *Denver and Rio Grand Western Railroad Co.*, 215 F.3d 1083 (10th Cir. 2000). In *Goebel*, a physician testified that the plaintiff's brain damage was caused by exposure to diesel fuel exhaust during an accident in a railroad tunnel. The trial court denied defendant's motion *in limine* to exclude the testimony, without giving any reasons. When the defendant renewed the objection "on the basis of *Daubert*" after conducting *voir dire* of the witness at trial, the court overruled the objection, stating simply: "I believe there is sufficient foundation here for the jury to hear this testimony." *Id.* at 1087. The trial court disposed of defendant's post-trial motion to strike the testimony in equally

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[5] Having concluded that the trial court abused its discretion, the Tenth Circuit found it unnecessary to determine whether the testimony would have been admissible "had a proper reliability determination been made." 214 F.3d at 1211. Instead, the court of appeals reversed and remanded the case for a new trial.

cursory fashion, stating that the court had "fully considered the matter" when it denied the motion. *Ibid.*

The Tenth Circuit reversed and remanded for a new trial, holding unequivocally that "a district court, when faced with a party's objection, *must adequately demonstrate by specific findings on the record* that it has performed its duty as gatekeeper." *Goebel*, 215 F.3d at 1088 (emphasis added). The Tenth Circuit explained:

> While the district court has discretion in the *manner* in which it conducts its *Daubert* analysis, there is no discretion regarding the actual *performance* of the gatekeeper function. * * * Without specific findings or discussions on the record, it is impossible to determine on appeal whether the district court carefully and meticulously reviewed the proffered scientific evidence or simply made an off-the-cuff decision to admit the expert testimony.

Id. at 1087-88 (internal quotation marks omitted).

The Tenth Circuit thus has made clear that a trial court's summary denial of a defendant's motion, objections at trial, and post-trial motions are "insufficient as a basis for appellate review" of the admissibility of expert testimony. *Goebel*, 215 F.3d at 1088. The Tenth Circuit is "convince[d]" of "the absolute necessity of district court findings on the record." *Ibid.* In the absence of such findings, the Tenth Circuit will not determine for itself whether or not the testimony could have been admitted after a proper analysis under *Daubert*. See also *Dodge* v. *Cotter Corp.*, 203 F.3d 1190, 1200 n.12 (10th Cir.) (urging the trial court to "vigilantly make detailed findings to fulfill the gatekeeper role crafted in *Daubert*"), petition for cert. filed, 69 U.S.L.W. 3002 (U.S. June 20, 2000) (No. 99-2033).

The rule in the Tenth Circuit squarely conflicts with the Sixth Circuit's approach in this case. Here, as in *Velarde*, the trial court refused Ford's request for a *Daubert* hearing, and then failed to make any findings on the relevance and reliability of the expert testimony. Here, as in *Goebel*, the trial court

denied Ford's motion without disclosing its reasons, and then summarily denied renewed objections to the testimony at trial and in post-trial motions. However, the Sixth Circuit, unlike the Tenth Circuit, proceeded to ignore the trial court's failure to explain its rationale for admitting the expert testimony and, indeed, deferred to the trial court's unexplained ruling. There can be no doubt that if this case had been decided in the Tenth Circuit rather than the Sixth Circuit, Ford would have obtained a reversal and a new trial rather than an affirmance of a $10.5 million judgment.

2. Like the Tenth Circuit, the Eleventh Circuit has recognized the importance of the express application of the *Daubert* factors. The Eleventh Circuit has stated that trial courts should "make specific fact findings concerning their application of Rule 702 and *Daubert* in *each* case where the question arises, because such findings will facilitate this Court's appellate review." *United States* v. *Lee*, 25 F.3d 997, 999 (11th Cir. 1994) (emphasis added). District courts in the Eleventh Circuit have heeded that instruction. *Shepherd* v. *Michelin Tire Co.*, 6. F. Supp. 2d 1307, 1309 (N.D. Ala. 1997) (citing *Lee* and stating that it was "necessary for this court to make findings of fact pertinent to and that justify the non-admissibility of [the expert's] testimony"). The Tenth Circuit has cited and relied upon *Lee* as a basis for its own decisions in this area. See *Goebel*, 215 F.3d at 1088.

3. The Seventh Circuit also carefully examines the record to ensure that the trial court has diligently performed its gatekeeping function under *Daubert*. Thus, when reviewing a trial court's admissibility ruling, the Seventh Circuit first "review[s] *de novo* the question of whether the court properly followed the *Daubert* framework." *Ancho* v. *Pentek Corp.*, 157 F.3d 512, 515 (7th Cir. 1998); see also *Smith* v. *Ford Motor Co.*, 215 F.3d 713, 719 (7th Cir. 2000) (concluding that the district court "properly applied the *Daubert* framework to the proposed expert testimony by considering whether that testimony is reliable and relevant to an issue in the case").

Only after determining that the trial court actually conducted a *Daubert* analysis does the Seventh Circuit proceed to determine "whether the district court abused its discretion in either the conclusion it reached to exclude [or admit] the expert testimony or the choice of factors it used to reach that conclusion." *Smith*, 215 F.3d at 719. See also *Ancho*, 157 F.3d at 515 ("Provided the district court adhered to *Daubert*'s parameters, we will not disturb the district court's findings unless they are manifestly erroneous.") (internal quotation marks omitted). The Seventh Circuit's approach is tantamount to that employed in the Tenth and Eleventh Circuits, because the court of appeals could not conclude, as a threshold matter, that the *Daubert* framework was properly applied if the trial court did not explain its reasoning.

C. Requiring District Courts To Provide A Reasoned Explanation For Admissibility Decisions Is Inherent In The *Daubert* Framework And Necessary To Ensure Proper Gatekeeping And Appellate Review

The Tenth Circuit's requirement that trial courts state their reasons for admitting or excluding expert testimony is clearly correct. Not only is such a requirement strongly suggested (if not required, see *Velarde*, 214 F.3d at 1209) by this Court's rulings in *Daubert*, *Kumho*, and *Joiner*, but it is necessary to ensure the proper performance of the gatekeeping function as well as appellate review. As the Tenth Circuit has observed, without an express explanation of the trial court's rationale, "it is impossible to determine on appeal whether the district court carefully and meticulously reviewed the proffered scientific evidence or simply made an off-the-cuff decision to admit the expert testimony." *Goebel*, 215 F.3d at 1088.

1. Under FRE 702, *Daubert* and *Kumho*, a trial court's decision whether to admit or exclude expert testimony encompasses a number of components. The court may be called upon to decide not only whether an expert is qualified, but also whether the expert's testimony is based on a reliable

methodology as well as relevant to the case at hand. Each of these decisions — qualification, reliability, and relevance (or "fit") — may in turn require certain threshold factual findings as well as a sophisticated analysis of all relevant considerations.

The inquiry into methodological reliability is especially complex and demanding. To conduct that inquiry properly, a trial court must first identify or distill the expert's methodology (which may involve choosing between competing versions of the methodology offered by the parties). In so doing, the court may be called upon to make factual findings concerning how the expert actually conducted the underlying evaluation, what sources of data were relied upon, and what reasoning was used in forming conclusions. In addition, a court may need to decide which of the *Daubert* reliability factors are pertinent, what other indicia of reliability or unreliability are present, whether the pertinent *Daubert* or other factors are satisfied, and how much weight should be given to each factor. And, of course, the court may be asked along the way to make purely legal rulings (such as the legally flawed ruling by the Eleventh Circuit in *Kumho* that *Daubert* was inapplicable to certain kinds of expert witnesses). All of the trial court's discretionary determinations, factual findings, and legal conclusions affect the ultimate decision whether the testimony is sufficiently reliable under FRE 702 to be presented to the jury.

Although the trial court's ultimate balancing of the *Daubert* factors is entitled to deference on appeal, certain decisions embedded within the court's analysis may be subject to a more stringent level of review. As one court has remarked in the *Daubert* setting, "[a]n abuse of discretion arises when the District Court's decision rests upon a clearly erroneous finding of fact, an errant conclusion of law or an improper application of law to fact." *In re TMI Litigation*, 193 F.3d 613, 666 (3d Cir. 1999), cert. denied, 120 S. Ct. 2238 (2000) (internal quotation marks omitted). As this characterization suggests, although review of the court's admissibility determination is generally deferential, legal errors affecting the court's analysis —

including errors in construing *Daubert* itself — are subject to *de novo* review. See *Goebel*, 215 F.3d at 1087 (explaining that the court "review[s] de novo the question of whether the district court applied the proper legal test" in admitting expert testimony).

This Court has made the same point in other contexts. For example, in *Cooter & Gell* v. *Hartmarx Corp.*, 496 U.S. 384 (1990), the Court ruled that a trial court's decision to impose sanctions under Rule 11 should be reviewed deferentially. The Court reasoned that the trial court, "[f]amiliar with the issues and litigants, * * * is better situated than the court of appeals to marshal the pertinent facts and apply the fact-dependent legal standard mandated" by the Rule. *Id.* at 402. The Court emphasized, however, that "this standard would not preclude the appellate court's correction of a district court's legal errors" — for example, "determining that Rule 11 sanctions could be imposed upon the signing attorney's law firm." *Ibid.* If the lower court made such errors, "[a]n appellate court would be justified in concluding that the district court * * * abused its discretion." *Ibid.* See also *Koon*, 518 U.S. at 100 ("A district court by definition abuses its discretion when it makes an error of law.").

Given the potentially complex, hybrid nature of the inquiry into reliability under *Daubert*, it is critically important that trial courts explain their reasons for admitting or excluding expert testimony. If a trial court does not explicate its analysis under *Daubert*, but merely announces its bare conclusion, it would be impossible for an appellate court to determine whether that conclusion is an abuse of discretion. Indeed, the trial court's silence may well mask a fundamental error of law that would indicate a clear abuse of discretion. On the other hand, the decision may rest heavily on a "clearly erroneous" finding of fact. Or the court may have failed to make a reasoned decision at all — a failing that, in another setting, this Court has deemed

an abuse of discretion *per se*. See *Foman* v. *Davis*, 371 U.S. 178 (1962).[7]

This case provides a telling example of the problems that may arise when trial courts are permitted to leave their rulings unexplained. For all we know, the district court erroneously believed that this Court's decision in *Daubert* was completely irrelevant to Richardson's expert testimony because Richardson was not relying on a novel, "scientific" technique. Indeed, plaintiffs made that very argument in opposition to Ford's motion, relying on Sixth Circuit case law that the panel acknowledged was subsequently overruled by *Kumho*. App., *infra*, 6a n.3. If the district court's decision were based on that legal error, it unquestionably would constitute an abuse of discretion. But since the Sixth Circuit had no idea as to the district court's rationale, it was unable to look behind the ruling to identify the legal error. The fact that the majority indicated that it was going to "defer" to the district court's unexplained ruling merely compounded the risk of error.[8]

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[7] In many other contexts, courts of appeals have recognized that, "[a]bsent some indication of how the district court's discretion was exercised, [the reviewing] court has no way of knowing whether that discretion was abused." *Chalmers* v. *City of Los Angeles*, 796 F.2d 1205, 1213 (9th Cir. 1986). See also, *e.g.*, *Becker* v. *Archo Chem. Co.*, 207 F.3d 176, 180 (3d Cir. 2000) ("[w]here * * * the district court fails to explain its grounds for denying a Rule 403 objection and its reasons for doing so are not otherwise apparent from the record, there is no way to review its discretion").

[8] Had the trial court disclosed its belief that the *Daubert* factors were inapplicable to Richardson's testimony, the court of appeals surely would not have deferred to the decision to admit the testimony. Instead, it would have been forced, if not automatically to reverse, then to conduct a *de novo* review of the admissibility determination itself. Indeed, many appellate courts faced with the lower court's express disavowal of *Daubert* have taken this approach. See, *e.g.*, *Kinser* v. *Gehl Co.*, 184 F.3d 1259 (10th Cir. 1999), cert. denied, 120 S. Ct. 985 (2000); *Westberry* v. *Gislaved Gummi AB*, 178 F.3d 257,

Nor is this the only potential legal error lurking in the district court's unexplained rulings. For example, the district court might have allowed Richardson to testify because it agreed with his conclusions, thus violating this Court's direction that the "focus" of the trial judge's reliability inquiry "must be solely on the principles and methodology, not on the conclusions that they generate." *Daubert*, 509 U.S. at 595. Or the district court might have concluded that it was irrelevant whether Richardson's engineering and accident reconstruction techniques were "generally accepted" by others in those fields or whether Richardson was "employ[ing] in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field." *Kumho*, 526 U.S. at 152. The district court might even have concluded that testing (or publication and peer review) is completely irrelevant to the work of an automotive engineer, notwithstanding plaintiffs' concession that "there are engineering or automobile journals that may have published articles on Bronco II rollovers." Plaintiffs' Response to Defendant's Motion In Limine, at 4.[9]

2. In addition to making meaningful appellate review possible, requiring trial courts to explain their admissibility rulings would result in more careful decisions whether to admit expert testimony. As Justice Breyer noted in his concurring opinion in *Joiner*, trial courts, in fulfilling their gatekeeping function, are sometimes asked "to make subtle and sophisticated

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262 (4th Cir. 1999); *Tanner* v. *Westbrook*, 174 F.3d 542 (5th Cir. 1999); *United States* v. *Iron Cloud*, 171 F.3d 587 (8th Cir. 1999); *United States* v. *Dorsey*, 45 F.3d 809 (4th Cir. 1995). Here, though, because the district court said *nothing*, its decision was presumed to have been properly reached, and hence entitled to deference.

[9] Of course, the potential for legal error is not limited to cases where the trial court *admits* expert testimony. For example, in excluding expert testimony as unreliable, a court might rely on the legally erroneous premise that satisfaction of each *Daubert* factor is mandatory or that the *Daubert* factors are exclusive.

determinations about scientific methodology and its relation to the conclusions an expert witness seeks to offer." 522 U.S. at 147. These determinations may be difficult because "judges are not scientists and do not have the scientific training that can facilitate the making of such decisions." *Id.* at 148. Although the evaluation of expert testimony may be challenging for courts not trained in scientific methods, "neither the difficulty of the task nor any comparative lack of expertise can excuse the judge from exercising the 'gatekeeper' duties that the Federal Rules impose." *Ibid.* Indeed, "when law and science intersect, those duties must be exercised with *special care*." *Ibid.* (emphasis added).

If trial courts were obliged to articulate their reasons for admitting or excluding expert testimony, it would encourage them to perform the often burdensome task of analyzing the testimony under *Daubert* diligently and consistently. In light of the difficulty of making the *Daubert* inquiry in many circumstances, trial courts may well have a natural inclination to avoid hard decisions and instead simply to allow questionable evidence to be assessed by the jury. The Sixth Circuit's approach encourages courts to give in to this inclination. Requiring the trial court to state its rationale thus would help to ensure the proper functioning of the *Daubert* framework at trial as well as on appeal.

3. Given the substantial benefits flowing from the requirement that trial courts state their reasons for admitting or excluding expert testimony, it should come as no surprise that academic commentators have endorsed the position adopted by the Seventh, Tenth, and Eleventh Circuits but rejected by the court below. According to a leading treatise, "[a] trial court should put on the record both its conclusion concerning the application of *Daubert* and the reasoning behind that conclusion." 29 C. WRIGHT & V. GOLD, FEDERAL PRACTICE AND PROCEDURE § 6266, at 23 (2000 Supp.). Moreover, "[t]he need to put the court's reasoning on the record" is especially "apparent in light of * * * *Kumho Tire*," which held that "the

factors applicable to determining the reliability of a given expert's testimony will vary depending on the area of his expertise, the nature of the issue, and the subject of his testimony." *Id.* at 28 n.90.2. Given this potential for variation, "[u]nless the trial court puts on the record the factors it believes are pertinent in a given case, a reviewing court will have difficulty determining what those factors were." *Ibid.*

II. IN CONFLICT WITH *DAUBERT* AND *KUMHO*, THE SIXTH CIRCUIT HELD THAT A TRIAL COURT MAY DISREGARD A RELEVANT *DAUBERT* FACTOR ON THE GROUND THAT THE FACTOR CAN ALWAYS BE CONSIDERED BY THE JURY

The Sixth Circuit's error went beyond failing to insist that the trial court explain its ruling. The court of appeals proceeded to speculate about how the trial court *might* have conducted a *Daubert* inquiry and, in so doing, endorsed a method of analysis that is plainly at odds with this Court's teachings. Specifically, the Sixth Circuit brushed aside Ford's unrebutted showing that Richardson's theories had never been tested, reasoning that

> [t]he district court, in its discretion, could have decided that Richardson's failure to test his theories went to the *weight* of his testimony regarding defects in the Bronco II, *not to its admissibility.*

App., *infra,* 8a (emphasis added). The Sixth Circuit stressed, in this connection, that "Ford was able to challenge the testimony regarding the alleged defects in the Bronco II through cross examination." *Ibid.* This analysis is seriously mistaken, inconsistent with this Court's decisions, and deserving of further review.

A. In *Kumho*, this Court instructed that "the trial judge must have considerable leeway in deciding in a particular case how to go about determining whether particular expert testimony is reliable." 526 U.S. at 152. At the same time, the Court made clear that a "trial court *should consider* the specific factors identified in *Daubert* where they are reasonable

measures of the reliability of the testimony." *Ibid.* (emphasis added). Three Members of the Court took pains to emphasize that the trial court's "discretion in choosing the manner of testing expert reliability" is "not discretion to abandon the gatekeeping function" or to "perform the function inadequately." *Id.* at 158-59 (Scalia, J., concurring). Thus, the "failure to apply one or another of [the *Daubert* factors] may be unreasonable, and hence an abuse of discretion." *Id.* at 159. Put another way, "*Kumho Tire*'s emphasis on the word 'may' should not be misunderstood to grant open season on the admission of expert testimony by permitting courts discretionarily to disavow the *Daubert* factors." *Black* v. *Food Lion, Inc.*, 171 F.3d 308, 311 (5th Cir. 1999).

The Sixth Circuit did not dispute (nor could it) that Richardson's theories were untested or that the *Daubert* testing factor was a "reasonable measure" of reliability in this case. The court of appeals' suggestion that the district court nonetheless could elect, in its discretion, to disregard this highly relevant and applicable *Daubert* factor when determining admissibility — on the ground that the *jury* would remain free to consider it — is completely contrary to this Court's instruction that trial courts "should consider" the *Daubert* factors where, as here, they are a reasonable measure of reliability.

The Sixth Circuit's reasoning is all the more troubling because it has the potential to apply in every case involving the admission of disputed expert testimony. *All* of the *Daubert* factors could be used in cross-examining an expert witness or by the jury in weighing the expert's testimony. The same is true for other indicia of reliability. For that reason, the Sixth Circuit's rationale would excuse the trial courts from adhering to *Daubert* at all.

B. The Sixth Circuit's analysis is especially problematic in this case, because testing is a critical component of the process of product design. As Judge Ryan pointed out in dissent, "actual testing is the principal method employed by the engineering

community to prove or disprove an engineering hypothesis." App., *infra*, 24a.[10] The majority's suggestion that the lack of testing, though pertinent to reliability, could be disregarded by a gatekeeper would also allow a trial court to avoid its obligation "to make certain that an expert * * * employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field." *Kumho*, 526 U.S. at 152. Not surprisingly, other courts have found that the failure to test alternative designs renders unreliable, and hence inadmissible, testimony by an engineering expert that a particular design is defective. See, *e.g.*, *Bourelle* v. *Crown Equip. Corp.*, 220 F.3d 532, 538 (7th Cir. 2000). The Sixth Circuit's analysis is at odds with these decisions.

III. THE ISSUES PRESENTED ARE SIGNIFICANT AND RECURRING

There can be little doubt that the issues raised in this petition arise with great regularity and are critically important to the proper administration of justice in the federal courts. Since this Court made clear in *Kumho* that the trial court's gatekeeping obligations extend to "*all* expert testimony" (526 U.S. at 147), "*Daubert* has become ubiquitous in federal trial courts." *United States* v. *Alatorre*, 2000 U.S. App. LEXIS

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[10] Even before *Kumho*, the lower courts routinely considered whether engineering experts had "tested" their alternative designs in product liability cases. See, *e.g.*, *Cummins* v. *Lyle Indus.*, 93 F.3d 362, 368-70 (7th Cir. 1996); *Pestel* v. *Vermeer Mfg. Co.*, 64 F.3d 382, 384 (8th Cir. 1995); *Stanczyk* v. *Black & Decker, Inc.*, 836 F. Supp. 565, 566 (N.D. Ill. 1993) (excluding testimony of expert whose redesign of allegedly defectively designed saw would not have permitted saw to perform its intended function). Use of the "testing" factor reflects a recognition that engineers themselves routinely test their designs to see if they work without impairing the utility of the product. See, *e.g.*, *Cummins*, 93 F.3d at 369 (citing expert witness's admission that "testing is a necessary part of the design process"); *Stancyzk*, 836 F. Supp. at 567 (noting that "the history of engineering and science is filled with finely conceived ideas that are unworkable in practice").

20177 (9th Cir. Aug. 16, 2000). Virtually every complex federal case involves the presentation of expert testimony, as do many simpler lawsuits. In many such cases, the expert testimony is challenged under *Daubert*. Statistical evidence confirms that issues related to the admission of expert testimony arise with great frequency.[11] And in many, if not most, of these cases — as in this case — the proffered expert testimony is critical, if not outcome-determinative. See, *e.g.*, *Weisgram* v. *Marley*, 120 S. Ct. 1011 (2000).

The issues presented are also of enormous practical importance. The requirement that trial courts state reasons for their admissibility determinations is indispensable to ensuring that the courts diligently fulfill their "gatekeeper" obligations under *Daubert* and *Kumho* and that the courts of appeals can review their decisions properly. Moreover, as the Chief Justice observed in *Daubert*, the standards governing the admissibility of expert testimony in federal trials plainly are "important area[s] of the law." *Daubert*, 509 U.S. at 601 (Rehnquist, C.J., joined by Stevens, J., concurring in part and dissenting in part); see also *Development in the Law: Confronting the New Challenges of Scientific Evidence*, 108 HARV. L. REV. 1481, 1485 (1995) (taking note of the "enormous increase in the use of scientific evidence" in federal litigation"). This case — in which a $10.5 million judgment rested on the unexplained, but erroneous, admission of expert testimony — is an appropriate vehicle for exploring these important issues.

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[11] A search of Westlaw's ALLFEDS database indicates that, in 1999 alone, *Daubert* was cited some 330 times by federal courts. In the 18 months since it was decided, *Kumho* has been cited some 366 times. These figures, of course, reflect only the published decisions.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted.

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OCTOBER 2000

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DOLORES CLAY, as Administratrix of the Estate of KATHLEEN P. CLAY; JOHN D. STROM, as Administrator of the Estate of Christopher J. Strom,	)	No. 98-4230
Plaintiffs-Appellees,	)	
v.	)	
FORD MOTOR COMPANY, a Delaware Corporation,	)	
Defendant-Appellant,	)	
WILLIAM R. SLONSKY,	)	
Third Party Defendant-Appellee.	)	

Appeal from the United States District Court
for the Northern District of Ohio at Akron
Nos. 96-02127; 96-02128 — David D. Dowd, Jr.,
District Judge.

Argued: September 17, 1999

Decided and Filed: June 28, 2000

Before: RYAN, MOORE, and GIBSON,[1] Circuit Judges.

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[1] The Honorable John R. Gibson, Circuit Judge of the United States Court of Appeals for the Eighth Circuit, sitting by designation.

GIBSON, J., delivered the opinion of the court, in which MOORE, J., joined. RYAN, J., delivered a separate dissenting opinion.

OPINION

JOHN R. GIBSON, Circuit Judge. Ford Motor Company appeals from a judgment on a jury verdict that the Ford Bronco II has a design defect that proximately caused the deaths of Kathleen Clay and Christopher Strom and injury to William Slonsky. Ford argues that the district court erred by denying its motions for judgment as a matter of law and a new trial. Ford also argues that the admission of the testimony of Dr. Melvin Richardson, the appellees'[1] expert witness, was error, as was the grant of prejudgment interest to the Clay and Strom estates. We affirm.

Slonsky was driving a 1988 two-wheel drive Bronco II north on Interstate 77 in Ohio on a Sunday night. In the front passenger seat was Sean Lance, the vehicle's owner,[2] and in the back seat were Clay and Strom. The four friends were headed to a club in Cleveland. Slonsky was apparently the designated

[1] The estates of Clay and Strom brought this action. Slonsky became a party by filing a counterclaim in response to Ford's impleader. Slonsky joined with the estates in presenting evidence at trial, and Ford appeals from the entry of judgment on the jury verdict in favor of each of the three parties. We will refer to the two estates and Slonsky collectively as "appellees."

[2] The Bronco II was actually purchased by Lance's mother, Lenora Buckland, for Lance to use.

driver; Lance had taken LSD and asked him to drive. Slonsky had never driven the Bronco II before that night, although he did drive it to a gas station to get cigarettes prior to leaving for the club.

Slonsky was driving 53 to 65 miles per hour in the middle lane of three lanes when he noticed a fast-moving car behind him. To avoid the faster car, he moved into the right lane. Once there, he observed that the car in front of him was slowing down, so he returned to the center lane. At that point, he felt the vehicle "jerk" or "overcorrect" to the left, and he responded by turning the steering wheel back to the right. At some point while trying to regain control of the vehicle, he may have turned the steering wheel as much as a full revolution.

The vehicle turned sideways, its passenger-side wheel rims leaving gouge marks in the pavement for approximately fifteen feet. It rolled two and three-quarters or three and three-quarters times, coming to rest on the driver's side about 235 feet from the end of the gouges. Clay and Strom, who were not wearing seatbelts, were ejected during the rollover; Clay died at the scene and Strom died at the hospital soon after. Slonsky and Lance, who had been wearing seatbelts, were able to climb out the passenger-side window. At the hospital, Slonsky tested negative for drugs and alcohol.

Dolores Clay and John Strom sued Ford on behalf of their children's estates in this diversity product liability action. Ford asserted third-party claims for indemnity and contribution against Slonsky, who then brought a counterclaim against Ford. After an extensive trial on liability, the jury found that the Bronco II has a design defect and that the defect proximately caused the deaths of Clay and Strom and the injuries to Slonsky. The jury rejected Ford's affirmative defenses of superseding cause and, as to Slonsky, assumption of the risk. After the damages phase of the trial, the jury awarded compensatory damages totaling $17.5 million, but found that the appellees were not entitled to punitive damages. Dolores Clay, John Strom, and Slonsky consented to remittiturs totaling $7 million

after the district court ruled on the post-trial motions and awarded prejudgment interest to the Clay and Strom estates.

Ford asserts that the appellees failed to present substantial evidence that the Bronco II has a design defect that caused this particular accident and that the verdict was against the weight of the evidence. Ford also argues that the district court erred by admitting Richardson's testimony and by awarding prejudgment interest.

I.

We first consider Ford's argument that the district court should have excluded Richardson's testimony. We review a district court's decision to admit or exclude expert testimony for abuse of discretion, *see General Elec. Co. v. Joiner,* 522 U.S. 136, 138-139 (1997), finding it only if we are firmly convinced that the district court erred, *see Greenwell v. Boatwright,* 184 F.3d 492, 495 (6th Cir. 1999). Deference to the district court's decisions "is the hallmark of abuse of discretion review." *Joiner,* 522 U.S. at 143. This is a close case, but after careful review of the record, we are not firmly convinced that the court abused its discretion by allowing Richardson to testify.

Prior to trial, Ford submitted a motion in limine to exclude or limit Richardson's testimony, alleging that his opinions did not meet the requirements for expert testimony. Ford requested a hearing on its motion. Finding that Ford's motion was predicated on a ruling made almost three months earlier by a district court in West Virginia and that Ford had shown no good cause for waiting to file the motion until one week before the start of trial, the court denied its request for a hearing. Having been alerted to Ford's objections, the court indicated that it might conduct its own voir dire of Richardson before he testified.

District court judges must determine whether an expert's testimony is both relevant and reliable when ruling on its admission. *See United States v. Jones,* 107 F.3d 1147, 1156, (6th Cir. 1997). In *Kumho Tire Co. v. Carmichael,* 526 U.S. 137

(1999), the Supreme Court confirmed what we held in *Jones*: the general gatekeeping obligation set forth in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), applies when considering all expert testimony, including testimony based on technical and other specialized knowledge. *See Kumho Tire*, 526 U.S. at 141. It further held that the specific *Daubert* factors — testing, peer review and publication, potential rate of error, and general acceptance in the relevant community — may be considered by the district court even when the proffered expert testimony is not scientific.[3] *See id.* Whether these specific factors are "reasonable measures of reliability in a particular case is a matter that the law grants the trial judge broad latitude to determine." *Id.* at 153.

Although the district court did not explicitly recite that Richardson's testimony was relevant and reliable, its rulings indicate that it made that determination. Ford's motion in limine squarely raised the issue of reliability. Ford made a variety of objections throughout Richardson's testimony, including a continuing objection to his ability to offer opinions with respect to accident reconstruction, and at the conclusion of the appellees' case, Ford moved to strike Richardson's testimony in its entirety. We conclude, based on the district court's rulings on the motions and objections, that the court determined Richardson's testimony was relevant and reliable.

The district court is not obligated to hold a *Daubert* hearing, and in the absence of a hearing, "we must review the record to determine whether the district court erred in its assessment of the relevance and reliability of the expert testimony." *Greenwell*, 184 F.3d at 498. Having undertaken that review, we agree that Richardson's testimony was relevant

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[3] This overruled our previous holding that the specific *Daubert* factors did not apply to non-scientific expert testimony. *See Jones*, 107 F.3d at 1158.

to the issues in this case. He testified regarding the alleged defects in the Bronco II, and he reconstructed the accident. Ford's sole challenge to Richardson's testimony is that it was not reliable. Our inquiry focuses on the methodology and principles used by Richardson, not on his conclusions. *See Daubert,* 509 U.S. at 595.

The court qualified Richardson as an expert in the fields of mechanical engineering, machine design, vehicle dynamics, and accident reconstruction.[4] Richardson has an undergraduate degree in mechanical engineering, masters degrees in both mechanical engineering (with an emphasis in machine design) and applied mathematics, and a doctoral degree in engineering mechanics. He taught at Clemson University for twenty years in the fields of mechanical engineering, machine design, dynamics, engineering mechanics, and stress analysis.

Richardson testified that a quarter or a third of the full-time consulting work he has done since 1985 has been in accident reconstruction, with the majority being reconstruction of automobile accidents. He spends the remainder of his consulting time generally in the field of machine design, looking at the process by which a machine is designed and determining whether the machine is suitable and safe for certain

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[4] After the appellees moved to qualify Richardson as an expert in these fields, the court called counsel to the bench and recognized that it had overruled Ford's earlier motion to exclude the testimony. When offered the opportunity to conduct voir dire at this point, Ford's attorney stated that he would prefer to question Richardson when a specific topic was reached, otherwise it would seem disjointed. The court again offered Ford the opportunity to question Richardson generally about those areas of expertise, but noted that questions on specific opinions would be best reserved for cross-examination. Ford's attorney stated that he did not disagree and that Ford would also make objections as to foundation at appropriate times.

purposes. On a couple of occasions, Ford has retained Richardson to consult and provide opinions.

Richardson testified that dynamics, or the analysis of the forces that produce motion in objects, can be used to analyze vehicles and parts of machines and that accident reconstruction is simply an application of dynamics. To reconstruct accidents, Richardson looks at the physical and factual information available, applies standard engineering principles to this information, and determines the most probable sequence of events.

Richardson has never worked in the automobile manufacturing industry, nor has he tested a two-wheel drive Bronco II. He has never published an article on vehicle handling and stability, although he has made presentations on those topics.

Richardson's testimony focused on three alleged defects in the Bronco II. First, he criticized the vehicle's "stability index" as too low. The stability index is calculated by dividing the track width, measured from the center of one tire to the center of the tire across from it, by the height of the center of gravity of a vehicle. Second, he testified that a rear stabilizer bar on the Bronco II would cause oversteer, which is characterized by spinning out, or a sliding of the rear of the vehicle, on a turn. Finally, he theorized that the front suspension used on the Bronco II, the Twin I-beam, causes "jacking." According to Richardson, in a hard turn, this suspension will cause the front end of the vehicle to rise and the track width to decrease, making the vehicle taller and narrower and elevating the center of gravity.

Richardson also reconstructed the accident, describing how photographs of the vehicle and the road related to his analysis and referring to a scale drawing of the highway where the accident occurred. He said that Slonsky's statement that the vehicle "overcompensated" during the double lane change was consistent with the Bronco II's tendency to oversteer.

Richardson stated that the rollover resulted from the inadequate stability of the Bronco II. He expressed the opinion that these handling and stability defects caused the Bronco II to roll over in this case, and that there were no other causes of the accident.

Ford characterizes Richardson's approach to accident reconstruction as "cavalier," stating that his investigation consisted only of reviewing the police accident report and "some" depositions, statements, and photographs and of visiting the accident site the day before he testified. Ford's expert on accident reconstruction also reviewed the police report, depositions, statements, and photographs. In addition, he inspected the actual vehicle and visited the accident site several months before the trial.

Ford does not indicate how Richardson's failure to inspect the Bronco II or his late visit to the accident site undermine his methodology of accident reconstruction or render his testimony about this particular accident inadmissible. The district court allowed a continuing objection by Ford to Richardson's testimony concerning accident reconstruction and ultimately rejected Ford's motion to strike.

Ford also focuses on Richardson's failure to test his theories that the Bronco II oversteers and "jacks," but does not challenge the principle that dynamics can be used to analyze vehicle designs and predict their motion. The district court, in its discretion, could have decided that Richardson's failure to test his theories went to the weight of his testimony regarding defects in the Bronco II, not to its admissibility. As with Richardson's accident reconstruction testimony, Ford was able to challenge the testimony regarding the alleged defects in the Bronco II on cross-examination. "Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence." *Daubert,* 509 U.S. at 596.

In accord with the teaching of *Greenwell,* we reviewed the record in detail to determine whether the district court erred in its assessment of reliability. We observe that Ford had a full opportunity to cross-examine Richardson, and that the court was careful to preserve and rule on Ford's objections. Because we are not firmly convinced that the district court erred, we find no abuse of discretion.

II.

In a diversity action, we apply the standard of review of the state whose substantive law governs when reviewing a denial of a motion for judgment as a matter of law that is based on the sufficiency of the evidence. *See Morales v. American Honda Motor Co.*, 151 F.3d 500, 506 (6th Cir. 1998). The district court applied the following standard:

> The evidence adduced at trial and the facts established by admissions in the pleadings and in the record must be construed most strongly in favor of the party against whom the motion is made, and, where there is substantial evidence to support his side of the case, upon which reasonable minds may reach different conclusions, the motion must be denied. Neither the weight of the evidence nor the credibility of the witnesses is for the court's determination in ruling upon [a motion for judgment as a matter of law].

Posin v. A.B.C. Motor Court Hotel, Inc, 344 N.E.2d 334, 338 (Ohio 1976). The Ohio Supreme Court has since stated that "the reasonable minds test . . . calls upon the court only to determine whether there exists any evidence of substantial probative value in support of the claims of the party against whom the motion is directed." *Texler v. D. O. Summers Cleaners & Shirt Laundry Co.,* 693 N.E.2d 271, 273 (Ohio 1998) (citations and internal quotations omitted).

Under Ohio law, a manufacturer is liable for a design defect if the plaintiff proves by a preponderance of the evidence both that the product was defective in design and that the defect was

a proximate cause of the harm for which the plaintiff seeks damages. *See* Ohio Rev. Code Ann. § 2307.73(A) (Anderson 1998). A product is defective in design if (1) the foreseeable risks of the design exceed the benefits, or (2) the product is more dangerous than an ordinary consumer would expect when used in a reasonably foreseeable way.[5] *See* Ohio Rev. Code Ann. § 2307.75(A) (Anderson 1995).

A.

Under the risk-benefit test, the foreseeable risks of a design are determined by considering the following non-comprehensive list of factors: the nature and magnitude of the risks in light of the intended and reasonably foreseeable uses of the product; the likely awareness of the product's users of those risks; the likelihood that the design would cause harm in light of its intended and reasonably foreseeable uses; and the extent to which the product conformed to any applicable product standards that were in effect when it left its manufacturer. See Ohio Rev. Code Ann. § 2307.75(B).

Ford argues that evidence regarding the Bronco II's production and development is irrelevant because the product, not the manufacturer's conduct, is the focus of a design defect claim. The Ohio statute, however, makes the foreseeable risks of the design of that product relevant. The handling and stability problems that the Bronco II had during production and development are relevant to the foreseeable risk factors, including the nature and magnitude of the risks in light of the vehicle's intended uses and the likelihood that its design would cause harm.

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[5] The current Ohio statute, which applies to products designed on or after January 27, 1997, omits the consumer-expectations test. *See* Ohio Rev. Code Ann. § 2307.75(A) (Anderson 1998).

James McClure, a Ford engineer, testified that during production of the Bronco II, Ford ceased real life J-turn testing in favor of computer simulations. A J-turn maneuver tests a vehicle at its limit by driving it straight at a given speed and then turning the steering wheel to a certain position and holding it in that position. Ford used 360 and 540 degree steering wheel inputs when conducting J-turn tests. During one such maneuver, a Bronco II went up on two wheels and flipped after its outrigger, a safety device used when testing vehicles, failed. Because of a concern for the safety of its test drivers, Ford switched to computer simulations.

McClure further testified that the Bronco IIs sold to the public had a revised stabilizer bar design that improved their handling and stability and that this design was not present in the vehicles tested earlier. Ford never did actual J-turn tests on the Bronco IIs that had the revised stabilizer bar design. Construing this evidence most strongly in favor of the appellees, reasonable minds could conclude that the Bronco II's design still posed a foreseeable risk of flipping during a J-turn.

Ford also argues that evidence presented regarding the Bronco II's stability index does not prove a design defect. At trial, Ford presented statistical evidence showing that vehicles with similar stability indexes have different rollover rates, and vehicles with different stability indexes have similar rollover rates. Fred Parrill, a Ford engineer, testified that there is no direct correlation between the static stability index and a vehicle's dynamic performance. McClure testified that stability index has little effect on overall vehicle performance.

Ford's challenge to the validity of stability index as a predictor of vehicle behavior is countered by a 1981 Ford program report in which its engineers recommend ways to increase the stability index of the Bronco II. In addition, Parrill testified that a higher stability index meant that a vehicle would have less propensity to roll. This is substantial evidence upon which reasonable minds could come to different conclusions,

including that a relatively low stability index indicated a foreseeable risk of rollover.

Under the risk-benefit test, the benefits of a design are determined by considering the following non-comprehensive list of factors: the product's utility, including performance or safety advantages; the technical and economic feasibility of using an alternative design; and the nature and magnitude of any foreseeable risks associated with an alternative design. *See* Ohio Rev. Code Ann. § 2307.75(C).

To show the benefits of the design of the Bronco II, Ford put on evidence of its utility. According to the Ford engineer who supervised vehicle dynamics at the time the two-wheel drive Bronco II was approved for production, a sport utility vehicle has several distinctive characteristics: first, the occupants sit relatively high for good visibility; second, the vehicle is maneuverable in tight spaces; third, it has cargo carrying capability; and finally, it has sufficient ground clearance to use on all road conditions, including off road.

The appellees presented evidence regarding the feasibility of alternative designs by pointing out options that Ford had considered and rejected during the development of the Bronco II. Ford considered three front suspensions for the vehicle: the Twin I-beam, the MacPherson strut, and the short-long arm. Ford chose the Twin I-beam, which caused the engine to be located higher in the vehicle than if either of the other suspensions had been chosen. Because the engine is one of the heaviest parts of the vehicle, the use of the Twin I-beam suspension worsened the stability index of the Bronco II.

The 1981 Ford program report regarding the stability index of the Bronco II listed five alternatives to increase the index. Three of the proposals that Ford did not choose provided for a wider track and a higher stability index than the proposal chosen. The increased track width was a problem because it would have required a sheet metal design change with a minimum one-year delay in production, and because Ford

planned to sell the vehicle in Japan. If reasonable minds could conclude that stability index is relevant to rollover propensity, they could also conclude that these alternative designs would pose less risk than the design Ford adopted.

Before Ford ceased J-turn testing, its engineers concluded that an improvement in the Bronco II's J-turn handling could be achieved by reducing its wheel size by one inch or increasing its track width by three to four inches. Although these suggestions were technically feasible, they were not implemented. Reasonable minds could reach different conclusions on whether the foreseeable risks of the Bronco II's design outweighed its benefits.

B.

Even if the jury did not conclude that the Bronco II had a design defect under the risk-benefit analysis, it could have found a design defect if the vehicle was more dangerous than an ordinary consumer would expect when used in a reasonably foreseeable manner. The "B Roll" videotape, introduced by the appellees, shows the Bronco II lift both right wheels off the ground during an avoidance maneuver done at 37 miles per hour. Ford argues that the tape shows the driver rapidly turning the steering wheel "in a radical maneuver that few people would have the courage to attempt." This is evidence upon which reasonable minds could come to different conclusions, including that the vehicle was being used in a reasonably foreseeable way and that the resulting two-wheel lift was more dangerous than an ordinary consumer would expect.

When determining whether a product is more dangerous than an ordinary consumer would expect, "evidence of unsafe, unexpected product performance is sufficient to infer the existence of a product defect." *State Farm Fire & Cas. Co. v. Chrysler Corp.*, 523 N.E.2d 489, 495 (Ohio 1988). On the night of the accident, Slonsky made what seemed to be a typical lane change maneuver. He testified that he felt the Bronco II overcorrect, he could not regain control of the vehicle, and it

started to roll. There is no evidence that Slonsky was speeding or driving erratically. The driver of a vehicle that was behind the Bronco II on the highway confirmed the lane changes Slonsky made and testified that Slonsky was driving at a normal rate of speed prior to the accident. This rollover — an unsafe, unexpected event — is evidence that supports a finding that the Bronco II has a design defect under the consumer-expectations test. A lane change on a highway while traveling at a normal rate of speed is a reasonably foreseeable use of the product, and reasonable minds could find the resulting accident more dangerous than an ordinary consumer would expect.

C.

Ford argues that even if the Bronco II has a design defect, the appellees did not prove that it was the cause of this accident. "[L]iability for a design defect is not proven absent proof of causation relating some aspect of the challenged design to the injury." *State Farm,*, 523 N.E.2d at 496. In *State Farm,* a couple's automobile caught fire while it was parked in their garage and they sued its manufacturer, alleging that a design defect caused the fire. *See id.* at 490-491. The court upheld a directed verdict for the manufacturer on this claim because there was no proof of causation:

> While proceeding to exclude possible causes of the fire other than design defects, plaintiffs presented no expert analysis or other evidence demonstrating that some aspect of the design of the Chrysler K-car would or could result in electrification or overheating of components and/or wiring sufficient to cause an auto fire when the ignition was turned off.

Id. at 495. In contrast, the appellees presented evidence that certain aspects of the Bronco II's design, including its narrow track width and high center of gravity, could result in wheel lift and rollover while the vehicle was in operation. In addition, Richardson testified that Slonsky's description of the Bronco II's behavior was consistent with the alleged oversteer

tendencies of the vehicle and that in his opinion, once the Bronco II was sideways, it rolled because of a stability defect. Reasonable minds considering this evidence could reach different conclusions on whether the alleged design defects caused the accident.

Construing the evidence most strongly in favor of the appellees, there was substantial competent evidence upon which reasonable minds could reach different conclusions, including that the Bronco II's design was defective under Ohio's statutory definition and that a defect caused the accident. Accordingly, we affirm the district court's denial of Ford's motion for judgment as a matter of law.

III.

We review a denial of a motion for a new trial for abuse of discretion, applying the federal standard rather than Ohio law. *See Anchor v. O'Toole*, 94 F.3d 1014, 1021 (6th Cir. 1996). In determining whether to grant a new trial when the claim is that the verdict is against the weight of the evidence, a district court must compare and weigh the opposing evidence and it must set aside the verdict if it determines that the verdict is against the clear weight of the evidence. *See J. C. Wyckoff & Assocs. v. Standard Fire Ins. Co.*, 936 F.2d 1474, 1487 (6th Cir. 1991). Typically, we will find abuse of discretion only if

> we have a definite and firm conviction that the trial court committed a clear error of judgment. And, in reviewing a trial court's denial of a new trial motion on the ground that the verdict is against the clear weight of the evidence, we accept the jury's verdict if it was reasonably reached.

Anchor, 94 F.3d at 1021 (citations and internal quotations omitted).

We have carefully reviewed the record and the district court's opinion and order. The district court considered the evidence that the parties presented at trial and concluded that it was possible to find that the scale tipped in the appellees' favor

and that the verdict was not against the clear weight of the evidence. Our discussion of whether Ford was entitled to judgment as a matter of law illustrates that the jury's verdict was reasonable. Because there is no indication that the court abused its discretion or erred in applying the standard for the grant of a new trial, we affirm its denial of Ford's new trial motion.

IV.

We review a district court's grant of prejudgment interest for abuse of discretion. *See Stallworth v. City of Cleveland,* 893 F.2d 830, 836 (6th Cir. 1990). Under Ohio law, an award of prejudgment interest must be made if the court finds "that the party required to pay the money failed to make a good faith effort to settle the case and that the party to whom the money is to be paid did not fail to make a good faith effort to settle the case." Ohio Rev. Code Ann. § 1343.03(C)(1) (Anderson 1993). The party requesting prejudgment interest has the burden of proving that it made a good faith effort to settle and that the other party failed to make a good faith effort to settle. *See Moskovitz v. Mt. Sinai Med. Ctr.*, 635 N.E.2d 331, 348 (Ohio 1994).

If a party has (1) fully cooperated during discovery, (2) rationally evaluated its risks and potential liability, (3) not attempted to unduly delay the proceedings, and (4) in good faith, made a settlement offer or responded to the other party's offer, that party has not failed to make a good faith effort to settle the case. *See Kalain v. Smith,* 495 N.E.2d 572, 574 (Ohio 1986). "If a party has a good faith, objectively reasonable belief that [it] has no liability, [it] need not make a monetary settlement offer." *Id.* Placing the burden of proof on the party seeking prejudgment interest creates difficulties for that party "since much of the information needed to make a case for prejudgment interest is in the possession of the party resisting an award." *Moskovitz,* 635 N.E.2d at 348.

To prove that they made a good faith offer to settle, the Clay and Strom estates presented the testimony of their attorney, Edgar Heiskell, who detailed their offers of settlement.[6] On August 24, 1996, Heiskell sent a package of materials to Ford regarding the claims and requested $1.2 million on behalf of each estate. He sent additional materials to complete the package four days later. On August 12, 1997, Heiskell faxed a message regarding settlement of his entire inventory of claims against Ford and requested $750,000 for each estate. On January 9, 1998, Heiskell sent a letter to Ford in another attempt at a "global settlement" and requested $550,000 for each estate. Finally, after the second day of trial, Heiskell requested $1.5 million for each estate.

The estates did not challenge Ford's cooperation during discovery or claim that Ford unnecessarily delayed the proceedings. They argued that Ford neither rationally evaluated its potential liability nor responded in good faith to their settlement offers.

On September 23, 1996, Ford sent what appeared to be a form letter to Heiskell, requesting some of the materials that it had received with the first settlement demand, along with additional materials that Heiskell had not initially provided. On July 23, 1997, Ed Stewart, a Ford attorney, sent a letter to Heiskell that discussed Ford's assessment of the merits of each of his cases and its refusal to pay exorbitant sums to settle cases with no merit. The letter did not specifically refer to the Clay and Strom matters. Stewart testified that he and Heiskell spoke on the telephone as often as weekly regarding the Bronco II cases. After Stewart requested a proposal to settle all of Heiskell's pending cases, Heiskell responded with the August

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[6] All three appellees sought prejudgment interest, and the district court denied Slonsky's motion. Slonsky did not file a cross-appeal on this issue.

1997 fax. Ford's first and only settlement offer in this case came after the jury had determined liability and prior to the damages portion of the trial when it offered $1.5 million to settle the three claims.

Heiskell testified that in late September 1996, Ford's general counsel told him that Ford was not going to settle any of his cases because it did not want to "incentivize" him. Ford has settled eleven of nineteen cases that Heiskell brought against it, some of them after this alleged statement was made.

The district court found that the Clay and Strom estates established that they attempted to settle the case in good faith and that Ford failed to act in good faith by refusing to make any settlement offers prior to trial. Our review of the evidence convinces us that the court did not abuse its discretion by making this finding, and once this finding was made, Ohio law mandated an award of prejudgment interest. *See* Ohio Rev. Code Ann. § 1343.03(C)(1).

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For the foregoing reasons, we affirm the judgment of the district court in its entirety.

DISSENT

RYAN, Circuit Judge, dissenting. Because I believe that the district court abused its discretion in admitting Dr. Richardson's testimony, I respectfully dissent.

The majority describes the admissibility of Dr. Richardson's testimony as a "close case." I disagree. In my view, this case presents a clear example of a court improperly abdicating its gatekeeping function under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), and *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999).

I.

Expert testimony is admissible under Fed. R. Evid. 702 only if the trial court finds that the testimony is both relevant and reliable. *Daubert,* 509 U.S. at 589, 594-95, 597. While *Daubert* focuses on "scientific" experts, the Supreme Court recently made clear that the *Daubert* principles apply to the opinions of "non-scientific" experts such as engineers. *Kumho,* 526 U.S. at 141. Here, there is no question that Dr. Richardson's testimony was relevant to the material issues presented in this product liability lawsuit. The critical question, then, is whether the testimony was reliable.

II.

The procedural history preceding the admission of Dr. Richardson's testimony provides the first unmistakable sign of trouble. As the majority acknowledges, the district court refused to hold a hearing on Ford's pretrial motion *in limine,* "reserv[ing] to itself the *possibility* of engaging in a brief voir dire of Dr. Richardson before his testimony is offered." (Emphasis added.) At trial, after Dr. Richardson summarized his training and experience, plaintiffs' counsel moved to qualify him as an expert in several engineering-related fields. Defense counsel declined the opportunity to conduct *voir dire* at that time because the questioning would appear disjointed from the jury's perspective. The court suggested that, given the breadth of Dr. Richardson's areas of expertise, defense counsel reserve his questioning of Dr. Richardson for cross-examination. The court then ruled that Dr. Richardson was qualified as an expert in several fields, with the understanding that the defense would make continuing foundational objections as the testimony proceeded. At the conclusion of the plaintiffs' case, Ford moved to strike Dr. Richardson's testimony pursuant to *Daubert.* The court overruled the motion without providing any reasoning on the record.

Although we have stated that a trial court need not hold an evidentiary hearing in every case to comply with *Daubert*, we have made it clear that the court must make an "*initial* assessment of the relevance and reliability of the expert testimony." *Greenwell v. Boatwright,* 184 F.3d 492, 498 (6th Cir. 1999) (emphasis added). Here, the district court did not make such an initial assessment, and indeed made no express assessment at any time as to the reliability of Dr. Richardson's testimony. The absence of such determination signals the trial court's failure to perform its gatekeeping function as mandated by *Daubert* and *Kumho.* In my view, this failure alone constitutes an abuse of discretion. The majority, however, is willing to overlook this failure, in essence substituting its own determination of reliability for that of the district court. Even if I agreed with the majority's approach, I cannot agree with the majority's assessment of reliability.

III.

Daubert sets forth a non-exclusive list of factors for trial courts to consider in determining the reliability of expert testimony: (1) whether a theory or technique can be (and has been) tested; (2) whether the theory or technique has been subjected to peer review and publication; (3) the known or potential rate of error in using a particular scientific technique and the existence and maintenance of standards controlling the technique's operation; and (4) whether the theory or technique has been generally accepted in the particular scientific field. *Daubert,* 509 U.S. at 593-94. A trial court may consider one or more of these factors, but the Supreme Court has cautioned that this "list of specific factors neither necessarily nor exclusively applies to all experts or in every case" and that a trial court has "broad latitude" to determine whether these factors are "reasonable measures of reliability in a particular case." *Kumho,* 526 U.S. at 141, 153. Despite the broad flexibility afforded to trial courts, I do not read *Daubert* or *Kumho* to mean that the complete disregard of one or more of the *Daubert* factors in a given case can never be definitive.

In its application of *Daubert,* the majority first devotes significant attention to Dr. Richardson's general education and experience. There is no question that a witness's education, personal knowledge, and experience are important components of the witness's qualification to render an expert opinion, *viz*, whether he or she is an "expert." But in cases involving scientific opinion *(Daubert* cases) or applied scientific opinion as in matters of engineering *(Kumho* cases), it is the *methodology* employed by the expert, not the expert's general educational qualifications, that is in issue. Dr. Richardson's impressive academic and experiential history tells us nothing about how he did what he did to reach his conclusions in this case. And I do not read the majority's opinion to suggest otherwise.

To be sure, the majority opinion summarizes Dr. Richardson's testimony describing the methods he employed in reaching his conclusions. For example, before he opined on accident reconstruction, Dr. Richardson reviewed the process he employed to reach his conclusions. He personally reviewed several discovery depositions in the litigation, reviewed police reports, and prepared a scale drawing reflecting points identified in the police reports. He also visited the scene of the accident, but this visit occurred the day before the trial, well after he had formed his opinion. Finally, Dr. Richardson reviewed photographs of the vehicle following the accident. He admitted, however, that he did not personally inspect the vehicle, but rather sent his son to take the photographs. While this evidence indirectly suggests that *Dr. Richardson* thought his methodology was reliable, it hardly suffices as evidence of reliability under *Daubert. See id.* at 157. Nothing in this testimony touches on any of the *Daubert* factors, or any other measures of reliability, for that matter. The record is absolutely devoid of any indication that the process or methodology Dr. Richardson employed in reaching his accident reconstruction opinion was "good science" or "good engineering.

The majority minimizes this deficiency by noting that Ford's accident reconstruction expert, Dr. Carr, performed some of the same procedures in reaching *his* conclusion about how the accident occurred, which, of course, was very different than Dr. Richardson's conclusion. It is not clear to me how this observation is useful. Similarity in the methods employed by two groups of experts tells us nothing about the legal sufficiency (*i.e.*, the reliability) of either. Moreover, plaintiffs' counsel did not object to the admission of Dr. Carr's testimony. The majority also overlooks potentially key distinctions between the experts' methods. Unlike Dr. Richardson, Dr. Carr personally inspected both the site of the accident and the vehicle following the accident. He also testified that his opinion on the accident reconstruction was based, in part, on his extensive personal experience testing the design and handling of the vehicle model involved in this case. Dr. Richardson's experience testing *any* vehicle was much more limited, and he did not rely on this experience in reaching his accident reconstruction opinion. More importantly, he conducted no tests whatsoever on the model of vehicle involved in this case.

The record is also devoid of any evidence showing that Dr. Richardson employed recognized, reliable scientific or engineering methodology in reaching his conclusion that the Bronco II has handling and stability design defects. What's more: the district court required no such evidence in discharging its gatekeeping function. In general, a district court should require compliance with at least some of the *Daubert* factors in determining whether an engineer's opinion on a design defect is reliable. Engineering is, after all, nothing more than applied science that "rests upon scientific foundations." *Id.* at 150. At a bare minimum, *Daubert's first* factor — "testing" or "falsifiability" — will generally require an engineer to test his hypothesis of design defect. As one of Ford's experts explained, an engineer's evaluation of a vehicle's design involves not only following generally accepted design procedures, but also performing a variety of actual tests on the

design during the development process. This is precisely what Ford did in developing the Bronco II.

Dr. Richardson, however, based his opinion that the Bronco II was defectively designed solely on his review of Ford's internal memoranda, industry comparisons of vehicle rollover rates, and Ford's vehicle testing. While there is a certain logical appeal to the notion that Dr. Richardson's opinion must be reliable if it rests upon data produced by the defendant, the notion does not withstand close consideration. What *Daubert* and *Kumho* require of the proponent of expert opinion is evidence that the methodology underlying the expert's conclusion is "good science" or "good engineering." That means that the plaintiffs were obligated to introduce at least some evidence that Dr. Richardson's method — that is, examining depositions, police reports, photographs of the vehicle, Ford's internal memoranda, industry comparisons of vehicle rollover risks, and Ford's vehicle testing data, but never personally examining the accident vehicle or testing any other vehicle of the same model — is a sound engineering methodology for evaluating vehicle design.

Daubert and *Kumho* teach that whether such methodology is "good engineering" is determined by testing such data for "falsifiability"; considering whether peer review and engineering publications approve of such an approach; considering the rate of error such data might produce; and considering whether the relevant scientific/engineering communities generally accept consideration of such data as a sound methodology for reaching a conclusion about the design of a vehicle. However, Dr. Richardson conducted no "falsifiability" testing at all on a vehicle of the model involved in this case, and although he conducted very limited testing on a Bronco 4X4, a model not involved in this case, he did not base his design defect opinion on such tests; he never subjected his theories or techniques to peer review or publication; he produced no evidence of an error rate or standards controlling his "technique"; and he did not attempt to show that his

"technique" or methodology was "generally accepted" in the scientific community. And the plaintiffs offered no proxies for these indicia of reliability.

The majority is very well aware, of course, of these deficiencies in the plaintiffs' evidence, but seeks to dismiss them as unimportant. With regard to the first *Daubert* factor — "testing" or "falsifiability" — the majority acknowledges that Dr. Richardson never tested his hypothesis but concludes that the district court "'could have'" decided that this failure "went to the weight of [Dr. Richardson's] testimony regarding defects in the Bronco II, not to its admissibility." Whether the court did so or not, we do not know, because the court made no finding on the matter in the record. I agree that, as a general matter, a hypothesis may satisfy *Daubert* even if it is untested by the expert proposing it. However, in such cases the proponent of the testimony must demonstrate other appropriate indicia of reliability. This requirement is all the more critical in a case in which an engineer who conducted no testing is testifying about a design defect, particularly given that actual testing is the principal method employed by the engineering community to prove or disprove an engineering hypothesis. But the plaintiffs submitted no evidence whatsoever that Dr. Richardson employed *any* acceptable scientific/engineering methodology, whether mentioned in *Daubert* or otherwise, to support his conclusion that the Bronco II was defectively designed.

I note in passing that even Dr. Richardson's general qualifications as an expert in vehicle design defect are questionable, given that he has never published a single article on vehicle handling or stability; has never conducted any testing on a Bronco II, the vehicle model involved in this case; and has never designed a vehicle or vehicle components. The only machine Dr. Richardson has designed himself is an okra picker. To be sure, such lack of specific experience will not always disqualify an expert, and Ford does not focus its challenge to Dr. Richardson's opinion on his general professional qualifications. But Dr. Richardson's questionable qualifications

to render an opinion concerning the adequacy of Ford's design of the vehicle *in this case* should at least have signaled to the trial court that the methodology this witness employed to get to his conclusion would require close gatekeeping scrutiny.

The majority further excuses the plaintiffs' manifest failure to introduce proof of the engineering soundness of Dr. Richardson's methodology, and perforce, the reliability of his ultimate opinion in accordance with *Daubert* and *Kumho*, by noting that Ford had an opportunity to cross-examine Dr. Richardson. It is not clear to me how this point is relevant, but in any event, I do not understand the majority's observation to suggest that such cross-examination would properly substitute for a trial court's gatekeeping function. This is not a duty a court may delegate to the jury under any circumstances. It was the trial court's gatekeeping duty to require proof that Dr. Richardson's methodologies were sound as a condition of admitting Dr. Richardson's opinions; the court did not do so and, therefore, the expert's opinion was improperly admitted.

In short, because I believe that Dr. Richardson's testimony should have been excluded, and that the error in admitting it was not harmless, I would reverse the district court's judgment.

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

CASE NOS. 5:96CV2127
5:96CV2128

John D. Strom, et al.,

and

Delores Clay, et al., Plaintiffs

v.

Ford Motor Company, Defendant/Third Party Plaintiff

v.

William R. Slonsky, Third Party Defendant.

ORDER

The parties have filed a series of motions in limine on the eve of trial. The thrust of the plaintiffs' case lies in the claim that Kathleen P. Clay and Christopher Strom, as back seat passengers, were killed as a result of a defectively designed 1988 Ford Bronco II sports utility vehicle which "rolled-over" in a June 18, 1995 single-car accident on Interstate 77 within the City of Akron. Ford has denied the basic claim, but has filed a third party action against the driver of the Bronco, William R. Slonsky seeking indemnification. Mr. Slonsky has filed a counterclaim against Ford.

I. THE PLAINTIFFS' MOTION (DOCKET #47) REQUESTS AN ORDER PROHIBITING FORD FROM INTRODUCING CERTAIN EVIDENCE.

The evidence sought to be prohibited includes the following:

1. ANY AND ALL ALLEGATIONS REGARDING THE CLOTHING AND PERSONAL GROOMING HABITS OF THE OCCUPANTS OF THE BRONCO II.

The motion is GRANTED.

2. ANY AND ALL ALLEGATIONS THAT ANY OF THE OCCUPANTS OF THE BRONCO II HAD USED CONTROLLED SUBSTANCES ON THE DAY OR NIGHT OF THE ACCIDENT.

The motion is denied as to the occupants, Slonsky and the front seat passenger, Sean Lance, to the extent they appear as witnesses and their credibility is at issue. If it is conceded by plaintiffs, Strom and Clay, that Kathleen Clay and Christopher Strom were not wearing their seat belts, the motion will be GRANTED. However, if one or both plaintiffs dispute the contention of Ford that they were not wearing seat belts, then the motion will be DENIED.

3. ANY AND ALL ALLEGATIONS THAT ANY OF THE OCCUPANTS OF THE BRONCO II USED CONTROLLED SUBSTANCES AT OTHER TIME DURING THEIR LIVES.

The motion is GRANTED.

4. ANY AND ALL ALLEGATIONS THAT WILLIAM R. SLONSKY, THE DRIVER OF THE FORD BRONCO II INVOLVED IN THE ACCIDENT AT ISSUE, HAD INGESTED ALCOHOLIC BEVERAGES DURING THE 12-HOUR PERIOD PRIOR TO THE ACCIDENT.

The motion is DENIED.

5. ANY AND ALL ALLEGATIONS THAT MR. SLONSKY WAS DIAGNOSED WITH ANY KIND OF PSYCHIATRIC DISTURBANCE OR MENTAL DISORDER PRIOR TO THE ACCIDENT.

The ruling is DELAYED until FORD demonstrates how such a diagnoses would be relevant and admissible in the context of Rule 403. The subject is not to be addressed in the opening statement of FORD.

6. ANY AND ALL ALLEGATIONS THAT PLAINTIFFS' DECEDENTS WERE NOT USING THEIR SEATBELTS AT THE TIME OF THE ACCIDENT.

The motion is DENIED as the court is of the view that such testimony is relevant as to proximate cause in the event the jury finds, as alleged, a defect in the design of the Ford Bronco II and is not prohibited by either Ohio statutory law or by Ohio common law.

II. FORD HAS FILED A SEPARATE MOTION IN LIMINE TO ADMIT EVIDENCE OF SEATBELT NON-USE (Docket 54)

The motion is GRANTED. See Section I (6) supra.

III. THE COMPETING MOTIONS REGARDING THE CLAIM OF THE PLAINTIFFS THAT FORD WITHHELD INFORMATION FROM NHTSA. (See Dockets #48, 51 and 52.)

The plaintiffs allege that in previous Bronco II rollover cases, FORD, through counsel has placed heavy reliance on a previous ruling of NHTSA which is presented and argued as proof of the absence of a design defect. The plaintiffs contend that a recent letter dated October 9, 1996 from NHTSA's assistant chief counsel Kenneth Weinstein demonstrates that FORD failed to make a complete disclosure of FORD documents to NHTSA, thus rendering NHTSA's previous ruling suspect.

The court has some difficulty in understanding how the previous ruling of NHTSA is admissible or why counsel for FORD should be permitted, over objection, to discuss the study or the ruling. On the other hand, as the plaintiffs seek punitive

damages, they may be of the view that the NHTSA process is admissible to demonstrate bad faith on the part of FORD on the issues relating to bad faith and punitive damages.

As a consequence, before ruling and before opening statements are made, the court will conduct a hearing at which time, the court will require of counsel a statement as to their plans by way of opening statement and the presentation of evidence as to the NHTSA process and ruling.

Preliminarily, and not as a binding ruling, the court is of the view that in the event FORD intends to argue and introduce in some fashion the NHTSA ruling, the court is inclined to permit introduction of the Weinstein letter under the provisions of Rule 803 (24). However, if the plaintiffs intend to raise, initially, the issue of the NHTSA study and conclusion, the court will likely deny the admission of the Weinstein letter. In any event, the court will defer a ruling until the hearing which will follow the impaneling of the jury.

IV. DEFENDANT FORD'S MOTION CONCERNING DOCUMENT DESTRUCTION ISSUES. (Docket #53)

The court is of the initial view that the evidence concerning document destruction is probably relevant, but even if relevant, Rule 403 may dictate granting the motion. However, the court will delay a ruling on the motion until it has a better understanding of the relevance in the context of the plaintiffs' claim that the destruction of the documents is consistent with a jury finding that the destruction was designed to cover-up concerns of Ford employees with the alleged tendency of the Bronco II as designed and manufactured to "roll-over" at low speeds.

Plaintiffs' counsel is cautioned to not discuss this contention in the opening statement and defendant FORD's counsel is invited to submit a limiting instruction to be given the jury contemporaneously with the admission of the testimony about the missing documents in the event the court concludes the testimony should be allowed.

V. THE MOTION OF FORD TO EXCLUDE OR LIMIT THE TESTIMONY OF DR. MELVIN RICHARDSON. (Docket #56)

This motion was not filed until April 27, 1998 even though it is obvious it is predicated on a ruling rendered on February 6, 1998 decision by Judge Copenhaver in a similar case in U.S. District Court in West Virginia. No good cause having been shown for the delay in filing such an obviously critical motion until one week before the commencement of the trial, the motion to hold a hearing during the trial to determine whether Dr. Richardson will be permitted to testify and opine in this case is DENIED. However, the court reserves to itself the possibility of engaging in a brief voir dire of Dr. Richardson before his testimony is offered.

VI. FORD'S MOTION TO EXCLUDE EVIDENCE OR ARGUMENTS REGARDING WARNING ISSUES.

The court delays a ruling on this motion until the hearing to be conducted after the jury has been selected and prior to opening statements.

VII. FORD'S MOTION TO EXCLUDE EVIDENCE OF MEDIA PROGRAMS RELATING TO THE FORD BRONCO II OR ANY OTHER UTILITY VEHICLE. (DOCKET 55)

Plaintiffs' counsel is directed to avoid any argument concerning media programs in the opening statement and the court will delay a final ruling until the plaintiffs have an opportunity to respond to the motion.

IT IS ORDERED.

/s/ David D. Dowd, Jr.
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

[Caption omitted]

Transcript of Proceedings
Before the Honorable David D. Dowd, Jr.
Senior United States District Judge
May 6, 1998

* * * [338] * * *

THE COURT: May I see counsel at the bench, please?

(Discussion at side-bar on the record).

THE COURT: I always give an instruction whenever I let any opinion testimony come in to describe what it is that it's opinion testimony. But before I do that, I recognize that the defendant filed a motion to quash his testimony, and I overruled it, but is there anything that you wanted advanced now on these various fields that he's moved to be qualified?

MR. DAWSON: You mean do I want to take him on voir dire, an opportunity to take him on voir dire?

THE COURT: Right now.

MR. DAWSON: I'd prefer when we get to a specific topic, otherwise I think it will seem disjointed and hard for the court, too.

THE COURT: I'm either going to let you voir dire him now or I'm going to let him go ahead.

MR. DAWSON: If that's the case, I would want to voir dire him now on his expertise of the dynamics on this particular vehicle and how it weaves.

THE COURT: We're doing it generally, not – he hasn't – he's asked to qualify him generally: Mechanical engineering, machine design, and vehicle design. Is that [338] what you said?

MR. HEISKELL: Vehicle dynamics.

THE COURT: Vehicle dynamics, right, and accident reconstruction. If you want to question him about that generally, fine, but those are broad areas. It seems to me that the kind of questioning you want to do would be best reserved for your cross-examination.

MR. DAWSON: I don't disagree, Your Honor; or foundation objections I think at the appropriate time.

THE COURT: Good enough.

MR. DAWSON: All right, Judge. Thank you.

* * * [423] * * *

MR. DAWSON: Your Honor, as you are aware we have objections to his foundation on the accident reconstruction premised on many things that we filed with a brief that the Court overruled at the time, and I was wondering how you wanted this handled. Is it your belief we should do it solely on cross-examination or on voir dire at this time?

THE COURT: What I would suggest you do is have a continuing objection to his expressing his opinions on accident reconstruction.

MR. DAWSON: That's fine, Judge, as long as the record is protected.

THE COURT: That's why I'm saying that's what you wanted, a continuing objection.

MR. DAWSON: Right. And then the Court can always revisit it after it hears the cross.

THE COURT: I can always revisit it, and as the [424] judge down in West Virginia, if you lose the case I can revisit it at that time. But what I'd rather avoid, both with the plaintiffs expert and your expert –

MR. DAWSON: I agree.

THE COURT: – are continuing objections. Because what happens is it gets impossible for the jury to track what's going on.

MR. DAWSON: Right.

THE COURT: That's why I think a continuing objection noted on the record before any opinions are offered protects you.

MR. DAWSON: That's great, Judge.

THE COURT: At this point.

MR. DAWSON: Is it all right if we do it right here?

THE COURT: Sure. I assume that's what you want is a continuing objection?

MR. DAWSON: It is, Your Honor, on the basis of foundation, lack of investigation, and so forth.

THE COURT: I will overrule it, but it is a matter of record for the appellate court and presumably they'll be able to find it when they review the record, if, in fact, you lose.

MR. DAWSON: Thank you, Judge.

* * * [628] * * *

MR. SMITH: Judge, the first thing we'd like to do for the record is move to strike all of the testimony of Dr. Richardson under the grounds of *Daubert* and Sixth Circuit [629] interpretation.

THE COURT: Overruled.

MR. SMITH: The next motion for directed verdict would be with regard to the design defect, and there are a number of grounds. The first one is that Dr. Richardson did not testify that there was a feasible alternative design which would have prevented the harm which the claimants suffered in this case.

THE COURT: All right. That's overruled. Go on.

MR. SMITH: The second basis for the defect in design is that Dr. Richardson's testimony constitutes junk science which this Court should not consider.

THE COURT: Overruled.

* * *

APPENDIX D

DOWD, J.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case No. 5:96 CV 2127
Case No. 5:96 DC 2128

Dolores Clay, et al., Plaintiffs

vs.

Ford Motor Company, Defendant/Third-party Plaintiff,

vs.

William R. Slonsky,
Third party Defendant/Counter-Claimant.

MEMORANDUM OPINION AND ORDER

(Resolving Docket Nos. 142 and 145,
Docket Nos. 148 and 149)

The above-captioned cases involve product liability claims brought by the estates of two decedents (Kathleen Clay and Christopher Strom) against Ford Motor Company for wrongful deaths caused by the rollover of a Bronco II vehicle designed and manufactured by Ford. Ford brought a third-party complaint against the driver of the vehicle, William Slonsky, who in turn counter-claimed against Ford.

Following jury verdicts and compensatory damages awards in favor of the plaintiffs and the counter-claimant,[1] several motions were filed. The motions were fully briefed and, on

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[1] Because the interests of the plaintiffs and the counter-claimant are essentially aligned, for convenience the Court will hereafter refer to the two estates and Slonsky collectively as "plaintiffs."

August 25, 1998, the Court conducted a hearing specifically on the motions for prejudgment interest. The various motions are now resolved as set forth below.

1. Defendant Ford Motor Company's Motion for Judgment as a Matter of Law or, in the Alternative, for New Trial as to Liability Determination (Docket No. 149)

Pursuant to Fed. R. Civ. P. 50(b), Ford filed this motion for judgment as a matter of law on the ground that there was no legally sufficient evidentiary basis for a reasonable jury to have ruled in favor of the plaintiffs as to liability. In the alternative, pursuant to Fed. R. Civ. P. 59(a), Ford moves for a new trial as to liability on the ground that the jury verdict was against the weight of the evidence.

In the face of a Rule 50 challenge to the sufficiency of the evidence supporting a jury's findings, this court "must apply the forum state's standard of review[.]" *Hostetler v. Consolidated Rail Corp.*, 123 F.3d 387, 390 (6th Cir. 1997). See also, *J.C. Wyckoff & Associates v. Standard Fire Ins. Co.*, 936 F.2d 1474, 1482 (6th Cir. 1991) ("this circuit adheres to the minority rule that state law governs the standard for granting motions for directed verdicts and judgments notwithstanding the verdict"). Under Ohio law,

> [t]he evidence adduced at trial and the facts established by admissions in the pleadings and in the record must be construed most strongly in favor of the party against whom the motion is made, and, where there is substantial evidence to support his side of the case, upon which reasonable minds may reach different conclusions, the motion must be denied. Neither the weight of the evidence nor the credibility of the witnesses is for the court's determination in ruling upon [the motion].

Posin v. A.B.C. Motor Court Hotel, Inc., 45 Ohio St.2d 271, 275, 344 N.E.2d 334 (1976).

Ford argues that it is entitled to judgment as a matter of law for several reasons: (1) plaintiffs failed to meet Ohio's requirement in a product liability case that there was available a practical and technically feasible alternative product design which would have prevented the harm for which damages were sought and which would not have substantially impaired the usefulness or intended purpose of the product; (2) plaintiffs failed to establish a design defect; and (3) plaintiffs failed to establish that the challenged design was the proximate cause of the harm.

The Court notes as an initial matter that Ford chose not to challenge plaintiffs' claims by way of a summary judgment motion. From the beginning of this case, Ford has relied upon a theory that the accident was caused not by any defect in the Bronco II but by the driver's desire and attempt to commit suicide. One can deduce from this that Ford believed it had a "winner" on the suicide argument but not on the design defect claim. In his opening statement to the jury, Ford's counsel emphasized that an EMT at the accident scene would testify that Slonsky told her he "had been thinking about killing himself[ ]" and that he "started moving the steering wheel back and forth and the vehicle rolled over." (Trans. Vol. I at 36). This testimony was reemphasized in the closing argument. (Trans. Vol. VIII at 1369; 1387-1390).

Now that a trier of fact has reached a verdict against Ford, on evidence which Ford knew about when it advanced its suicide theory, Ford urges this Court to issue judgment as a matter of law on the ground that the evidence was insufficient to support the jury's verdict. However, as set forth below, a review of the record, "[when] construed most strongly in favor of the [non-movants], [shows that] there is substantial evidence to support [their] side of the case, upon which reasonable minds [might] reach different conclusions[.]" *Posin supra.*

Ford asserts that plaintiffs failed to offer substantial evidence of a design defect and of the availability of a practical and technically feasible alternative design because they relied

solely on the testimony of their expert, Dr. Melvin Richardson, who "exhibited a complete lack of foundation for his expert opinions." (Motion, Docket No. 149, at 2). This assertion fails to take into account the fact that plaintiffs, in their case in chief, offered extensive designated deposition testimony[2] of Ford's own engineers who worked on the design of the Bronco II. This testimony, independent of Dr. Richardson's testimony, established facts regarding the design of the Bronco II as well as facts about available alternatives, which the jury could have accepted as true.

Testimony of Mr. Parrill, a Ford engineer,[3] established the following facts:

(1) Ford knew the prototype[4] had a stability problem in 1981 (Trans. Vol. 11 at 77);

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[2] Because the parties designated a significant amount of deposition testimony for admission into the record, rather than read all of this testimony to the jury, the Court encouraged counsel to agree on summaries of what each of the deponents had to say. They were able to do so and the summaries, not the actual depositions, were read to the jury. The Court first instructed the jury about the use of deposition testimony in general and specifically about the "summary" method that was to be used in this trial. *(See* Trans. Vol. II at 71-74).

[3] Except where otherwise indicated by footnote, these facts are established from the summary of the designated deposition testimony of Fred Parrill who, "[i]n the early 1980s . . . was an executive engineer responsible for chassis engineering in the light truck department [of Ford] . . . [and, specifically,] . . . was assigned the chassis engineering responsibilities for the Bronco II program." (Trans. Vol. II at 74-75).

[4] Another Ford engineer, Richard Antoun, described a "prototype vehicle" as "a pre-production concept vehicle that incorporates the various parts the engineers feel will eventually be released on a production level sold to the public." (Trans. Vol. II at 98). He stated that "prototype vehicles are not sold to the public." *Id.*

(2) Ford had five alternatives for addressing the problem, which represented a range of improvement in the stability index[5] of the Bronco II from 1.85 to as high as 2.25 (*Id.* at 77);

(3) Ford chose Proposal No. 2, which caused no interference with the Job One[6] target date *(Id.* at 77-78);

(4) Proposal No. 2 offered a maximum stability index of 2.03 (*Id.* at 79);

(5) By August 28, 1981, the mechanical prototype Bronco II "[r]equire[d] improvements in directional stability, lane changes, roll control and cornering" (*Id.* at 78);

(6) Even after Proposal No. 2 was implemented, J-turn maneuvers conducted on the Bronco II resulted in "outrigger contact[7]. . . on every test run at speeds over 25 miles an hour" (*Id.*, footnote added);

(7) Ford engineers suggested an increase in track width of at least two inches and a reduction in wheel size to 14 inches *(Id.* at 80);[8]

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[5] "Stability index" is "a ratio involving the track width of the vehicle and the height of the center of gravity." (Trans. Vol. II at 76).

[6] "Job One" refers to the target date for production of the very first of whatever vehicle is being designed. Job One for the Bronco II was January, 1983. (Trans. Vol. II at 75-76).

[7] "For outrigger contact to occur, you have to have wheel lift on at least one wheel. Outriggers are placed on the vehicle to allow the test drivers to test the limits of the vehicle within the test parameters and to prevent the vehicle from actually rolling over, thus potentially injuring the driver." (Trans. Vol. II at 79-80).

[8] On cross examination of engineer Richard Antoun, he stated that, although Ford's design group did consider increasing the track width,

(8) It was technically feasible for Ford to have released the Bronco II with 14-inch wheels and a track size increased three to four inches *(Id.)*;

(9) These changes would have put the Job One date "[i]n serious jeopardy" and would "almost certainly" have increased "[t]he program cost, weight and investment status" (*Id.* at 81);[9]

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it found that use of "a different type of front stabilizer bar . . . significantly improved the handling characteristics of the vehicle." (Trans. Vol. II at 104-105). However, another Ford engineer presented by the plaintiffs, James McClure, testified that this stabilizer system was never tested on the test track; it was tested only by computer simulation. (*Id.* at 123). He further testified that "[a]nother reason why Ford's management didn't want to widen the Bronco II was because of its desire to keep the vehicle narrow in order to be able to market the Bronco II in Japan." (Id. at 108). During his cross examination, McClure stated that the "new stabilizer bar system . . . was much more effective and essentially gained the performance Ford was looking for in the Bronco II." *(Id.* at 119).

[9] James McClure also testified on direct that the Antoun group's recommendation, based on testing in mid-March of 1982, that increased track width of three to four inches was advisable, "would most likely cause a delay in Job One and Ford knew that Chevy was coming out with the S-10 Blazer in the early fall of 1982. As matters stood, if Ford kept Job One it would still be six months behind Chevy." (Trans. Vol. II at 109).

(10) From April or May of 1982 through production, Ford did no more real-life J-turn testing,[10] but instead did only computer simulations (*Id.*);[11]

(11) Shortly before production in the fall of 1982, some changes were made to the Bronco II but they were "pretty much cosmetic" (*Id.* at 82-83).

Mr. Parrill also testified that "Ford would not want to put or allow on the market a vehicle which they [sic] thought would roll over if the driver in a panic situation, such as trying to avoid a child, swerved or jerked the steering wheel." (*Id* . at 85).

To counter the above testimony, Ford presented the following facts, also from Mr. Parrill's deposition unless otherwise indicated:

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[10] In his cross examination testimony, James McClure stated that "[i]n a J-turn test you drive a vehicle down the road at a given speed and then make a steering wheel input and hold it. One full revolution of the steering wheel is 360 degrees. If you have both hands on the steering wheel about the best you can do is probably 180 degrees." (Trans. Vol. II at 117).

[11] Richard Antoun, on cross examination testimony offered by Ford, stated that J-turn tests were done to "correlate" to the computer program. (Trans. Vol. II at 102). The computer simulations allowed Ford to "evaluate a lot of difference [sic] designs much quicker because it didn't have to go through and produce actual parts, put them on a physical vehicle, and run a test on a test track for each different design." (*Id.* at 102-103). James McClure, on direct, testified that, to his knowledge, this was the first time testing had been done by means of computer simulation and that the "technology was just coming on board." (*Id.* at 122-123).

(1) Ford conducts "exhaustive testing of its products using a number of different procedures" (Trans. Vol. II at 86);[12]

(2) "[T]he J-turn maneuver was [not] the focused and principal development tool in the Bronco II program" (*Id.*);[13]

(3) "If there had been concerns about the safety of the Bronco II prior to Job One that were not resolved, Ford simply would not have gone into production with it." (*Id*);

(4) "Ford has delayed the introduction of many new products because it wasn't satisfied" (*Id.*);

(5) When Ford conducted the J-turn maneuvers in the spring of 1982, "it expected and intended the prototype versions of the Bronco II to tip up and for the outriggers to contact the ground . . . [so as] to find out the limits of the vehicle under various combinations and the drivers intentionally pushed the vehicles until outrigger contact occurred." (Id. at 89);

(6) "The vehicles tested were prototype vehicles and not the vehicle that was released to the public." (*Id.*);

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[12] Richard Antoun confirmed that "Ford ran various types of tests on the Bronco II before selling it to the public." (Trans. Vol. II at 100).

[13] James McClure, during cross examination, testified that Ford also did lane change maneuver tests. "In that test there was a pylon course set up with specific gates and the test driver would make a rapid steering input to have the vehicle change lanes and then recover into the next lane." (Trans. Vol. II at 118).

(7) Mr. Parrill knew of "no direct correlation between a vehicle's static stability index and its dynamic performance." (*Id.*);[14]

(8) In Mr. Parrill's opinion, "handling and stability characteristics of the Bronco II were fully and carefully tested and evaluated prior to its release for sale to the American public." (*Id.* at 90).

(9) Mr. Parrill himself "leased and drove a Bronco II as his personal family vehicle." (*Id.* at 91).

The plaintiffs also produced testimony from Richard J. Antoun, a Ford engineer since 1972, that in August of 1982, under instructions, he collected all documents relating to the design of the Bronco II and thereafter, before Job One, "sanitized" them, which he defined as "to look at a document for clarity and accuracy and correct any issues on the document that may not be clear and correct." (Trans. Vol. II at 96-97). Testimony presented on cross examination was that marginal notations were made on some documents "because there was some terminology used that was unclear and ambiguous and easily could be misinterpreted by someone who didn't understand what the document process consisted of." (*Id.* at 106).

Plaintiffs also offered the designated deposition testimony of James McClure, another Ford engineer involved in the "ride and handling aspects of the development of the Bronco II[.]" (*Id.* at 107). He stated that "[t]he reason Ford stopped J-turn testing in limits maneuvers in May 1982 was because in one of the maneuvers a Bronco II had gone up on two wheels, the outrigger failed and dug into the cement and 'Pole vaulted the vehicle over,' and Ford was concerned about the safety of its test drivers." (*Id.* at 107-108). However, on cross examination

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[14] Similarly, James McClure testified on cross examination that "[t]he static stability index has very little effect on how the vehicle performs overall." (Trans. Vol. II at 119).

he stated that he was so enthusiastic about the Bronco II that he "made sure he had one of the first ones when the vehicle was first sold to the public in 1983." (*Id.* at 121). He used the vehicle as his principal family vehicle and felt the vehicle was fine for his children to drive. (*Id.*).

As far as Ford's argument that plaintiffs failed to establish design defect, as opposed to failure to wear seat belts, as the proximate cause of at least the deaths at issue here, the jury might certainly have concluded on the evidence that had there been no rollover, seatbelts on the backseat passengers would have never become an issue. The fact that a jury *might* also have concluded that even had there been injuries there might not have been deaths if the passengers had been wearing seatbelts is not the issue. Those kinds of choices are made by juries all the time. That is precisely their role: to decide which of two stories makes the most sense to them based on the evidence. This Court cannot conclude that there was insufficient evidence for the jury to conclude that a design defect, not the lack of seatbelts, proximately caused the deaths of plaintiffs' decedents."[15]

As stated in the introductory paragraphs of this section, under Ohio law, construing the evidence most strongly in favor of the plaintiffs and without weighing the evidence or judging the credibility of the witnesses, since there is substantial evidence to support plaintiffs' side of the case, upon which reasonable minds may reach different conclusions, Ford's motion for judgment as a matter of law must be denied. *Posin, supra.*

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[15] Seatbelt use is not an issue with respect to the counter-claimant Slonsky because he *was* wearing his seatbelt, a fact which his attorney used as proof that he could not have been trying to kill himself by rolling over the vehicle. The jury was certainly free to conclude, based on common sense, that if he had been trying to commit suicide he probably would not have belted himself in.

Turning now to the alternative: a new trial as to the liability determination, the Court finds Ford's position to be equally lacking in merit. "[T]he question of whether a new trial should be ordered is determined with reference to federal procedural law." *Porter* v. *Lima Memorial Hospital*, 995 F.2d 629, 635 (6th Cir. 1993). A new trial is properly granted where a verdict is against the weight of the evidence. The Sixth Circuit has stated:

> One who challenges the weight of the evidence argues that the jury's verdict, although supported by some evidence, is still clearly against the weight of the evidence. Unlike motions for directed verdicts and judgments notwithstanding the verdict, in ruling upon a motion for a new trial based on the ground that the verdict is against the weight of the evidence, the trial court must compare the opposing proofs, weigh the evidence, and set aside the verdict if it is of the opinion that the verdict is against the clear weight of the evidence. *TCP Indus., Inc.* v. *Uniroyal Inc.*, 661 F.2d 542, 546 (6th Cir. 198 1). It should deny the motion if the verdict is one which could reasonably have been reached, and the verdict should not be considered unreasonable simply because different inferences and conclusions could have been drawn or because other results are more reasonable. *Id.*

J.C. Wyckoff & Associates, 936 F.2d at 1487. *See also Porter* v. *Lima Memorial Hospital*, 995 F. 2d at 635 (verdict must be set aside if it is against the clear weight of the evidence but not if it is one which could reasonably have been reached).

For this part of its motion, Ford essentially relies on the same arguments as when requesting judgment as a matter of law.[16] Ford argues that plaintiffs presented testimony of only

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[16] The Court notes that plaintiffs' brief (Docket No. 158) does not directly address this portion of the motion. The Court has been left to its own devices to search out the position contrary to Ford's position. However, the Court also notes that just because a party fails to argue

one expert, Dr. Richardson, who had never actually ridden in or tested a Bronco II, had not personally inspected the vehicle or spent much time at the accident site, and allegedly derived the bulk of his knowledge not from independent testing and evaluation but from his interpretation of Ford's internal documents. Ford argues that, in contrast, it offered the testimony of the two principal engineers of the Bronco II who "gave extensive testimony concerning the design and development of the Bronco II." (Motion at 13).

Once again this fails to recognize that a significant portion of that "extensive testimony" of Ford's own engineers, placed in evidence by the plaintiffs, supported the plaintiffs' position. It is not impossible to weigh this testimony and conclude that the scale tips in the plaintiffs' favor.

Ford also asserts that it submitted the accident reconstruction testimony of Lee Carr who opined that "the design of the Bronco II had nothing to do with the accident which occurred on June 18, 1995." (Motion at 13). Ford concludes that "[w]hen compared to what Dr. Richardson had to offer the jury, the comparison of proofs is overwhelming in Ford's favor." (*Id.*).[17] Ford, however, does not itemize the

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a point does not mean that the movant automatically wins on that point.

[17] Ford points out the Mr, Carr has a "wealth of experience [in] testing [] multipurpose vehicles[,]" that he "has undertaken hundreds of tests and evaluations, many of which have nothing to do with any particular litigation," and that "[b]ased on these *independent* tests and evaluations, Mr. Carr was able to reach his conclusion that the Bronco II is a safe, stable vehicle which was appropriately designed." (Motion at 13, emphasis added). At the trial, when Ford cross-examined Dr. Richardson, counsel attempted to discount his credentials by eliciting testimony that Richardson had never actually "work[ed] as an engineer for any automotive company or even automotive supplier[.]" (Trans. Vol. III at 455). The suggestion was that Dr. Richardson, notwithstanding his training and experience, was incapable of truly

testimony of either expert nor make any point-by-point attempt to show *why* it believes that Mr. Carr's testimony tips the scale overwhelmingly in its favor."[18] On a motion for new trial, the burden is on the movant to set forth with specificity the evidence offered by each side so that the Court can analyze which side has "the clear weight of the evidence" in its favor."[19]

Finally, Ford asserts that it offered unrefuted testimony that it was failure to wear seatbelts rather than any defect in the vehicle which was the proximate cause of the injuries here. This issue was discussed above and need not be revisited.

The Court concludes that the jury's verdict was not against the clear weight of the evidence. Accordingly, Ford is not entitled to a new trial on liability.

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understanding the nuances of designing a motor vehicle. It is entirely possible, however, that a jury would consider Dr. Richardson, with no agenda to protect an industry that directly provides his livelihood, as being as independent as Mr. Carr was when he was conducting tests "hav[ing] nothing to do with any particular litigation." Therefore, there is no necessity to place more weight on Mr. Carr's testimony than on Dr. Richardson's simply on the basis of their experience as opposed to their training in engineering.

[18] It can come as no surprise to anyone, even jurors unschooled in the intricacies of the law and courtroom procedure, that Ford's expert was going to opine that no defect in the Bronco II caused the accident while plaintiffs' expert would opine the opposite. The mere fact that the two experts reached opposite conclusions has no significance at all, much less overwhelming significance.

[19] Even though the trial transcript may not have been available at the time of the filing of the motion, Ford certainly had its own trial notes to go on and could have set forth its argument with greater specificity. It has failed to do so and the Court has no obligation to sua sponte comb through the transcript, especially in view of the detail set forth in the discussion above.

In summary, Ford's motion for judgment as a matter of law (Docket No. 149, Part 1) is DENIED. Further, Ford's motion for a new trial as to liability (Docket No. 149, Part 2) is DENIED.

II. Defendant Ford Motor Company's Motion for New Trial or, in the Alternative, for Remittitur as to Damages Determination (Docket No. 148).

Pursuant to Fed. R. Civ. P. 59(a), Ford filed this motion for a new trial on the grounds that the jury's damages awards were improperly influenced by bias and prejudice, were clearly excessive and/or were against the weight of the evidence. In the alternative, pursuant to Fed. R. Civ. P. 59(e), Ford moves for a remittitur reducing the jury's damages awards to reasonable amounts consistent with the damages testimony adduced at trial.

Rule 59(a) permits the granting of a new trial "in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States[.]" The Sixth Circuit has stated that a new trial is warranted

> when a jury has reached a "seriously erroneous result" as evidenced by: (1) the verdict being against the weight of the evidence; (2) the damages being excessive; or (3) the trial being unfair to the moving party in some fashion, *i.e.*, the proceedings being influenced by prejudice or bias.

Holmes v. *City of Massilion, Ohio,* 78 F.3d 1041 (6th Cir.) (citations omitted), *cert. denied,* 117 S. Ct. 312 (1996). A court may deny a motion for a new trial on the condition that the plaintiff accept a remittitur of the jury verdict. *Jackson v. City of Cookeville,* 31 F.3d 1354, 1358 n. 4 (6th Cir. 1994) (citing *Dimick* v. *Schiedt*, 293 U.S. 474, 482 (1935); *Smith* v. *John Swafford Furniture Co., Inc.*, 614 F.2d 552, 553 (6th Cir. 1980)).

In this motion, Ford asserts that it is entitled to a new trial for all three reasons cited by *Holmes*. First, Ford argues that evidentiary errors committed by this Court and the fact that

the jury was improperly allowed to consider the question of punitive damages tainted the jury's deliberations and decision regarding compensatory damages, even though punitive damages were not ultimately awarded.[20] Ford also asserts that plaintiffs' counsel made inflammatory remarks during the damages phase closing arguments regarding "sending a message" to Ford and that, although the Court admonished counsel, these remarks had their desired effect. Second, Ford argues that the damages awards were excessive and "beyond the maximum damages that the jury reasonably could find to be compensatory for a party's loss." *Hill v. Marshall*, 962 F.2d 1209 (6th Cir. 1992), *cert. denied*, 509 U.S. 903 (1993). Finally, Ford argues that the awards were against the clear weight of the evidence, in that there was little evidence from which the jury could properly determine compensatory damages let alone damages in the amount awarded.

The Court bifurcated liability from damages.[21] At the beginning of the damages phase, the Court instructed the jury prior to taking any testimony so the jury would have the benefit of the instructions as it listened to the testimony. General damages instructions were first given as follows:

> The fact that I am instructing you on the proper measure of damages should not be considered as an indication of any view of mine as to the issue of damages. Instructions as to the measure of damages are given only for your guidance in determining whether an award of damages would be appropriate in the event the plaintiffs meet their burden of proving by a preponderance of the evidence both the existence of

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[20] Ford also asserts that time constraints placed on it during the damages phase and this Court's refusal to grant a directed verdict on the question of punitive damages resulted in juror bias and prejudice.

[21] The transcript of the damages phase of the trial is located at Docket No. 177.

damages and that the damages were proximately caused by the defendant's conduct.

You must determine from the preponderance of the evidence an amount of money that will reasonably compensate the plaintiffs for those injuries or damages proximately caused by the defendant's conduct. The damages you award must be fair compensation, no more and no less.

You are not permitted to award speculative damages. The fact that the precise amount of damages may be difficult to ascertain does not preclude the right of recovery for future damages.

In determining the amount of any damages that you decide to award, you should be guided by dispassionate common sense. You must use sound discretion in fixing an award of damages, drawing reasonable inferences from the facts in evidence. You may not award damages based on sympathy, speculation, or guess work. On the other hand, the law does not require that the plaintiffs prove the amount of their losses with mathematical precision, but only with as much definiteness and accuracy as circumstances permit.

(Trans. Vol. X at 1470-71).

The Court then instructed the jury regarding damages for the wrongful death claims brought by the estates of the two decedents:

Dolores Clay has asserted a wrongful death claim on behalf of the Estate of Kathleen Clay and John Strom has asserted a wrongful death claim on behalf of the Estate of Christopher Strom. The amount of damages recoverable in an action for wrongful death depends on the loss resulting to the beneficiaries of each estate.

You are instructed that the parents and brothers and sisters of Kathleen Clay and Christopher Strom are the beneficiaries of their decedents' estates. Further, under Ohio law, the parents are presumed to have suffered damages by reason of the wrongful deaths of their children. The siblings of the two decedents must prove their damages by a preponderance of the evidence.

The damages recoverable consist of the amount which would fairly compensate the beneficiaries for the loss resulting to them from the death. In determining the amount of damages, you may consider all factors existing at the time of the decedent's death that are relevant to a determination of damages suffered by reason of the wrongful death. There must be evidence of each element of damage you include in your award. These factors include the following:

(1) Loss of services;

(2) Loss of the society of the decedent, including loss of companionship, care assistance, attention, protection, advice, guidance, counsel, instruction, training and education;

(3) Loss of prospective inheritance to the decedent's heirs at law at the time of death; and

(4) The mental anguish incurred.

(Trans. Vol. X at 1471-72).

The Jury was then instructed as follows with respect to the damages of the counter-claimant, Slonsky:

If you find that Mr. Slonsky suffered damages which were proximately caused by Ford, you may award such damages as may seem just and fair. Such damages may include the following: (1) physical and mental pain

> and suffering; (2) medical and hospital expenses; and (3) mental anguish.

(Trans. Vol. X at 1472-73).[22]

Following testimony,[23] which will be set forth below in detail, counsel for the parties made their respective arguments.

Counsel for the Strom estate and the Clay estate began his argument with the punitive damages issue and spoke at length on that. Then co-counsel addressed the issue of compensatory damages as follows:

> Ladies and gentlemen, I have been sitting here quite frankly trying to think of what I can tell you with respect to the compensatory damages in this case. But I'll be honest with you, I'm not sure what I have to say, my words would add anything to the moving testimony of Mr. John Strom and his family and Delores Clay and her family. But I would like to start by simply saying in a perfect world we would have perfect justice and if we had perfect justice I could stand up here today and tell you, the jury[,] the only thing we want is to have Kati

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[22] The jury was also instructed regarding punitive damages and the following special interrogatory was given to the jury:

> Interrogatory No. 3: Do you find by clear and convincing evidence that Ford manifested a flagrant disregard for the safety of persons who might be harmed such that the following are entitled to punitive damages as result of Ford actions?

The jury responded "no" as regards both the two decedents' estates and as to Slonsky. Therefore, no punitive damages were awarded. (Trans. Vol. XI at 1666-1667).

[23] In addition to testimony offered by parties and family members, Roger Maugh, director of Ford's Automotive Safety Office during the time the Bronco II was under design, and Lou Camp, the present director of the Automotive Safety Office, also testified. Their testimony was aimed at fending off a punitive damages award.

and Chris back, and if we were able to do so that they could walk through the doors of this courtroom, embrace their respective families and all the pain would be gone. We can't do that. That's not an option. Under our system the option is money damages.

Getting back to my original question, so what do we do. We can't bring Kati and Chris back and it's really impossible to put a number on the loss of these promising young lives but I would ask you to keep this in mind, in this day and age where athletes are receiving millions of dollars for playing a seasonal game or where corporate executives are receiving tens of millions of dollars for bonuses for doing a great job, we have to know that the value of the lives of these children is substantial.

Lastly, I just want to say that these families have been through a terrible, terrible ordeal. And of course they have taken comfort in each other, they have taken comfort in their religion, and the Bible of course is a great source of comfort, such as this passage from St. Mark. "Suffer the little children to come unto me and forbid them not for such is the kingdom of God."

I ask you to do the right thing for the families of these two promising young people. Thank you.

(Trans. Vol. X at 1624-27).

Slonsky's attorney then spoke briefly of his physical injuries, but concentrated on the mental anguish suffered by Slonsky:

I want to talk to you about pain, real pain and I know that this jury will not come under any type of a theory that if it doesn't bleed it doesn't hurt because I think the testimony that you heard in this case is consistent with someone who has tons of pain, intense pain, so much pain, so much pain, that in order to relieve

his guilt he tries to kill himself twice on the night of the accident. So much pain that he tries to disassociate himself with his closest friends, to try to forget.

* * *

I want to talk to you about his general damages. I want to tell you that his damages are the same as the Strom family and the Clay family, that parents worst nightmare. I don't know how it can be equaled, but in comparison to the damages one thing you should remember, Chris and Kati are at peace now; Bill's not. Please remember that when you're assessing compensatory damages in this case.

(Trans. Vol. X at 1628-29). The remainder of counsel's argument went to the issue of punitive damages.

Counsel for Ford made his closing argument with respect to compensatory damages as follows:

What I have tried to do here is I have tried to address — I don't think I can address the issue of compensatory damages. I don't think anyone can. I think that's an issue solely in your providence. For me to get up here and say what a life is worth is just not appropriate or proper. But I think what we ought to focus on and look at is whether or not the claim of punitive damages is appropriate and proper in this case.

(Trans. Vol. X at 1631). The remainder of counsel's argument related solely to the issue of punitive damages.

On rebuttal, plaintiffs' lawyer stated in part:

This is your opportunity, ladies and gentlemen of the jury. Compensate the victims who remain behind. Yes, compensate them with that sense that you bring into this courtroom, that life experience that each of you has in terms of loving and honoring a memory of somebody that you love.

(Trans. Vol. X at 1653-54).

The Court will first address Ford's motion as it relates to Slonsky. In the damages phase of the trial Slonsky testified that the only physical injury he suffered in the accident was "road rash" on his right arm and the top of his head. He indicated that these had completely healed and he has no physical problems as a result of them. (Trans. Vol. X at 1479). He further testified that after the accident he returned to his job at Sears but found it "incredibly hard to concentrate." He started being late for work on a regular basis. Sears asked him to resign in January of 1996. Since then, he has been unable to hold any job for more than a few months. (*Id.* at 1480). On cross examination, however, he acknowledged that at his deposition he had stated that he left Sears "to explore other options" and because he "wasn't very happy with the job." (*Id.* at 1492).

When asked about his recollection of the accident, he testified that when the vehicle began to roll he was "terrified" because he "couldn't regain control," and all he could hear was glass breaking, everything was so loud." (*Id.* at 1482). When the rolling stopped he got out of the car. There was "[b]lood everywhere." He "saw Chris [Strom] laying on the road. He had blood all around him." (*Id*). He did not see Kati Clay and he "thought she was in pieces." (*Id.* at 1483). He stated: "I felt so incredibly responsible for what happened, I didn't want to live anymore. I felt guilty." *(Id.*). At the scene of the accident, Slonsky tried at least twice to jump off the overpass into the traffic below. He had to be restrained by Sean Lance, the front seat passenger who also survived the accident, and later by a paramedic and a witness. (*Id.* at 1483-84).

Slonsky was treated for his minor injuries at the hospital and thereafter taken to the inhouse psychiatric unit at St. Thomas Mental Health Center where he stayed for one week. (*Id.* at 1485). He testified that his "mental problems" have continued and that he got counseling for a short time from a Ms. Shaffer and a Mr. Huhn, but that he discontinued both because he could not "relate" to either of them. (*Id.* at 1485-86). He had

trouble concentrating and could not sleep. He had nightmares, including one recurring nightmare where he could hear Kati calling for help and another where he managed to get the Bronco under control and nobody was hurt. (*Id.* at 1486-87). After the accident his family physician put him on an antidepressant, but it did not seem to work so he quit using it. (*Id.* at 1488). On cross examination, he admitted that he never told this to his doctor and never tried to get a different treatment. (*Id.* at 1493). He tried heroin after the accident, but admitted on cross that he had previously tried marijuana a few times. (*Id.* at 1493, 1496). He stated that he tried to disassociate from his old friends and that he had trouble maintaining relationships. (*Id.* at 1488, 1490-91).

Amanda Markovitz, Slonsky's girlfriend of a few years, testified that before the accident he smiled a lot, was real outgoing and was always a very funny individual. (*Id.* at 1500). After the accident, he was withdrawn and did not like to be around people. He lost his sense of humor and his drive to do anything. (*Id.* at 1501-02). She said that he "flies off the handle quite often and very easily[,]" a trait that was "not as prominent" before the accident. (*Id.* at 1502). She testified that she never dated him after the accident because it was "too stressful" since all he wanted to do was "talk[] about Kati and Chris." (*Id.* at 1502-03). On cross examination, she stated that she had recommended that he get some counseling but that she did not know whether he ever did. (*Id.* at 1503).

Dr. Ralph Huhn, the second of Slonsky's counselors, testified that after the accident Slonsky was "very distraught and upset and suicidal." (*Id.* at 1506). Huhn diagnosed Slonsky with Post Traumatic Stress Disorder, "an anxiety kind of a disorder that occurs after an individual has been in a very traumatic, potentially life-threatening experience." (*Id.* at 1507). He described the symptoms of the disorder as follows: "reexperiencing the event in one way or another while awake or in dreams, nightmares. There's often a tendency to deny parts of what has occurred, there's often guilty feelings involved and

associated anxiety disorders, anxiety kinds of symptoms, disturbed sleep or appetite, exaggerated startled reaction, a variety of things." (*Id.* at 1507-08). In Huhn's opinion, the disorder was caused by the accident. (*Id.* at 1509). He also doubted that Slonsky's symptoms were cured when Slonsky voluntarily terminated their relationship in July of 1996. He believes that Slonsky "was not really ready to deal with the whole thing yet." He wanted to talk about everything but what was the problem. (*Id.* at 1509-10). On cross examination, Huhn, who was a psychologist, stated that he had not referred Slonsky to a psychiatrist because he was already on some medication from another physician. (*Id.* at 1511). He also admitted that Slonsky "sort of discharged himself" and just "dropped out of treatment." The last time Huhn saw Slonsky was July 15, 1996, a little more than one year after the accident. (*Id.* at 1511-13).

The jury awarded Slonsky $3.5 million in compensatory damages. No punitive damages were awarded. Although the testimony suggested that he has indeed suffered as a result of the accident, he has no permanent physical injuries, no physical injuries which caused him an inordinate amount of pain for even a short while, and no significant medical bills resulting from those physical injuries. His testimony does suggest that the actual accident was, not surprisingly, a very terrifying experience, made even more terrible when he saw his friends in the roadway and realized they were dead. There is plausible evidence that his personality has changed since the accident and that he has suffered psychological trauma which he may not yet have been able to fully face. All that having been said, and recognizing that pain and suffering and mental anguish are subjective elements which are hard to quantify, the Court is convinced, having heard all the testimony and having reviewed it in transcript form, that there is simply not enough evidence to support the *amount* of the award to Slonsky.

Accordingly, the Court will deny the motion for new trial on damages as to Slonsky conditioned on his acceptance of a remittitur in the amount of $2,000,000.00 for a resulting

damages judgment against Ford Motor Company in the amount of $1,500,000.00. Failing such acceptance, a new trial will be granted Ford on Slonsky's compensatory damages.

The Court will now address Ford's motion as it relates to the claims of wrongful death brought by the two decedents' estates.

At the damages phase of the trial, Rev. John Strom, the father of the decedent, Christopher Strom, testified that the family was close. (Trans. Vol. X at 1519). He and his wife, Mary, have five children: Wendy, Brian, Chris, Karen, and Debra. Wendy is 36 years old and Debra is still in college. (*Id.* at 1515). Chris was born in 1969. He graduated as valedictorian of his high school class and received scholarships for college. He went to the University of Toledo and graduated cum laude with a degree in astrophysics. (*Id.* at 1516). Rev. Strom described Chris as "a very unique young man." He "had a mind that was constantly examining things, constantly struggling with things, constantly trying to understand, but coupled with this was a tremendous sense of humor." They called him the "family comedian." (*Id.* at 1517-18). Chris had a great love for his mother and would "talk at great length about a lot of things" with his father. (*Id.* at 1519). He related well with his sisters and brother, especially Karen and Debra. (*Id.*).

The day of the accident was Father's Day. They had gone over to show Chris a house they were going to buy because Rev. Strom was retiring. (*Id.* at 1520). Chris and Kati had plans to go out for the evening. (*Id.*). Around 10:30 p.m. the phone rang and somebody told them to come to Akron General Hospital because there had been a very serious accident. He, his wife, Wendy and Debra went. Karen and her husband were gone. Brian stayed home to field any calls. (*Id.* at 1521). Rev. Strom remembers that he felt extreme fear when they got to the hospital and were told to go into a small room, which in his role as a pastor, he had entered many times with other people. He knew what was coming; he knew the room "is used only to tell families that there's an extremely serious medical condition or

death." (*Id.* at 1522). After they were told that Chris was dead, he went in to see Chris. The rest of the family "didn't feel strong enough, didn't feel that they could go." (*Id.*).

Rev. Strom testified that what he will miss most is "the opportunity to see what might happen to a young man who had the ability and the mind that he had because he wasn't even — hadn't even begun to use all of the gifts he had been given." *(Id.* at 1524). Rev. Strom said that he loved Chris as much on the day of the accident as on the day of his birth, when he had experienced "an absolute sense of wonder[.]" (*Id.* at 1523-24).

Mary Strom, Chris's mother, testified that on the night of the accident, she had gone to bed early because she had to work the next day. Her son Brian woke her up and told her the hospital had called and Chris was in an accident. (*Id.* at 1534). As they drove to the hospital it was "like opening the flood gates." (*Id.* at 1535). She was trying to prepare for what she was afraid they would hear. (*Id.*).

After the accident, she asked the children to go through Chris's personal effects because she was "just unable to help with that." (*Id.* at 1535). The children knew she would want some things as mementos; so they packed them in boxes and put them away. Later she was able to look at them. It was then that she discovered the Pooh Bear they had given Chris as a baby, which he had all through school and kept on his bed when he was in college. He planned to take it to California when he moved there to look for a new job. She now has it on their bed and "it speaks to me of the joy of his life now where I couldn't look at it before." (*Id.* at 1535-36).

Chris's sisters, Wendy and Debra, also testified. They told how they were all home on Father's Day preparing to celebrate Chris's birthday, which had actually been the day before but which they were going to celebrate on Monday. (*Id.* at 1528). Wendy says she thinks of her brother every day, that she misses talking to him, and the way he always brought a new perspective to things. She misses being able to see him with

children of his own because she thinks he would have been a good father. (*Id.* at 1528-29). Debra was seven years younger than Chris. Because they were very much alike, she admits they did not always get along, but they still strongly identified with each other. She described him as having a great sense of humor. When she heard about the accident, she was at home making Chris a cheesecake for his birthday. She was the one who answered the phone. (*Id.* at 1530-31).

Following deliberations, the jury denied any punitive damages, but awarded the estate of Christopher Strom $7 million in compensatory damages. Under the law, there must be some justification beyond sympathy for the dollar amount set by the jury. The Stroms presented no evidence of medical bills, funeral expenses, or other monetary damages that the estate suffered as a result of Christopher's death. Some individual family members testified regarding their personal loss of society and their mental anguish, which is an element of damages under Ohio's wrongful death statute. This testimony was quite moving and reflected, of course, a loss that was tragic and painful. There was, however, no specific testimony regarding the elements of loss of services and/or loss of prospective inheritance.

Under the law, as the jury was instructed, parents are presumed to have suffered damages as a result of the death of their child; siblings, however, must prove their damages. The Court, having originally heard the testimony and having now carefully re-examined the transcript of that testimony, and without in any way diminishing the loss that the Stroms have suffered, nonetheless concludes that the jury's award was excessive.

The Court is of the view that the evidence would support a damages verdict for the estate of Christopher Strom of no more than $5,000,000.00.

Accordingly, the Court will deny the motion for new trial on damages as to the estate of Christopher Strom

conditioned on acceptance of a remittitur in the amount of $2,000,000.00 for a resulting damages judgment of $5,000,000.00 less the $150,000.00 already received from other sources, for a total final judgment against Ford Motor Company in the amount of $4,850,000.00. Failing acceptance of the remittitur, a new trial will be granted Ford on compensatory damages for the estate of Christopher Strom.

The Court will now address Ford's motion as it relates to damages for the estate of Kati Clay.

Delores Clay, Kati's mother, testified during the damages phase. Mrs. Clay is divorced from Kati's father, Arvin Clay; they had two other children, Arvin, Jr. and Elizabeth. Arvin, Jr. is 23 years old and Elizabeth is 18. (Trans. Vol. X at 1538). Mrs. Clay described Kati as compassionate, very creative and possessing a good sense of humor. She loved the earth and the outdoors; she loved music and hoped to study the engineering aspects of music. She was both shy and outgoing; she was able to fit into any situation, but she liked to be "to herself a lot." Mrs. Clay testified that Kati was a "daddy's girl" and could "wrap her father around her little finger." (*Id.* at 1539-40).

On the day of Kati's death, they had had an early supper. They talked about the fact that Chris was moving to California and how much Kati would miss him. (*Id.* at 1541). Mrs. Clay was in bed when the telephone call came about the accident. She woke her husband, Kati's stepfather, to tell him she had to go to the hospital. He, however, stayed home because Delores really did not anticipate that it would be anything serious. (*Id.* at 1542). She apparently did not really believe that "it's that phone call." She remembers taking time to brush her teeth before she left for the hospital. (*Id.* at 1543).

When Mrs. Clay arrived at the hospital, she was escorted into a small room similar to the one John Strom had described. She recalls "wondering why am I here." Then they told her that Kati was dead. She testified that she went to see Kati and that

she wanted to touch her but was afraid. She "wanted to look her over and hold her again." Kati had "big gouges in her body." Mrs. Clay remembers, however, how she noticed Kati's beautiful hands and was reminded how carefully she had always taken care of her hands. (*Id.* at 1543). It is apparent from Mrs. Clay's testimony that she went through these events in what can only be described as a state of disbelief.

After the funeral, Mrs. Clay tried several times to go through Kati's possessions, but could not. Kati's friends would come over and sit in her room. Eventually each family member and friend took something that meant a lot to them. Mrs. Clay kept all of Kati's manuscripts; she also kept a lot of her art work. (*Id.* at 1544).

Kati's sister, Elizabeth, also testified during the damages phase. Elizabeth is two years younger than Kati. (*Id.* at 1546). They were very close and did everything together. Elizabeth testified that she and Kati went to the mall every Saturday, went to movies, and talked. She described Kati as "sassy and she was funny and charming and beautiful." Elizabeth stated that she never met anyone who did not like Kati. (*Id.*).

Elizabeth was asleep when the telephone rang on the night of the accident. Her stepfather came knocking on her door and said they had to go to the hospital. She did not, however, know how serious it was. She asked if she should stay home in case Arvin called. Her dad answered in the negative because "your sister may be dying." (*Id.* at 1546). She recalled that at the hospital they put her "in this little room" and her mom "comes walking in and nodding her head no and she's crying. And that's how I found out." (*Id.* at 1547).

Elizabeth has kept as a memento of her sister an earring that she found in Kati's room. She said that the last thing she had ever given Kati was a pair of dolphin earrings, because Kati liked dolphins. After Kati's death, Elizabeth found one of the earrings and kept it. She has never been able to find its mate. (*Id.* at 1547).

As already noted, parents are presumed to have suffered damages as a result of the death of their child whereas siblings must prove their damages. Here only one parent and one sibling testified as to their losses. The Court, having originally heard the testimony and having now carefully re-examined the transcript of that testimony concludes that the jury's award was excessive. As with the Stroms, the Court in no way means to suggest that the loss suffered by the Clays was not significant and painful. However, the testimony does not support the amount of damages awarded.

The Court is of the view that the evidence would support a damages verdict for the estate of Kathleen Clay of no more than $4,000,000.00.

Accordingly, the Court will deny the motion for new trial on damages as to the estate of Kathleen Clay conditioned on acceptance of a remittitur in the amount of $3,000,000.00 for a resulting damages judgment of $4,000,000.00 less the $150,000.00 already received from other sources, for a total final judgment against Ford Motor Company in the amount of $3,850,000.00. Failing acceptance of the remittitur, a new trial will be granted Ford on compensatory damages for the estate of Kathleen Clay.

III Plaintiffs' Motion for Award of Pre-Judgment Interest (Docket No. 142) and Third-Party Defendant/Counter-Claimant's Motion for an Award of Pre-Judgment Interest (Docket No. 145)

Plaintiffs have filed a motion, pursuant to Ohio Rev. Code § 1343.03(C),[24] for an order awarding prejudgment

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[24] Ohio Rev. Code § 1343.03(C) provides:

> Interest on a judgment, decree, or order for the payment of money rendered in a civil action based on tortious conduct and not settled by agreement of the parties, shall be computed from the date the cause of action accrued to the date on which the money is paid, if, upon motion of any party to the action, the

interest at a rate of ten percent (10%) per annum, from June 18, 1995 to May 29, 1998, the date of judgment. Counter-claimant Slonsky has filed a similar motion. The parties have fully briefed the motion. On August 25, 1998, the Court heard testimony with respect to this issue.

"'The decision as to whether a party's settlement efforts indicate good faith is generally within the sound discretion of the trial court.'" *Cox v. Oliver Machinery Co.*, 41 Ohio App.3d 28, 37, 534 N.E.2d 855 (1987) (quoting *Kalain v. Smith*, 25 Ohio St.3d 157, 159, 495 N.E.2d 572 (1986); *Huffman v. Hair Surgeon, Inc.*, 19 Ohio St.3d 83, 482 N.E.2d 1248 (1985)).

In *Kalain*, the Ohio Supreme Court stated:

> The statute was enacted to promote settlement efforts, to prevent parties who have engaged in tortious conduct from frivolously delaying the ultimate resolution of cases, and to encourage good faith efforts to settle controversies outside a trial setting.

Kalain, 25 Ohio St.3d at 159. Similarly, in *Pevko v. Frederick*, 25 Ohio St.3d 164, 495 N.E.2d 918 (1986), the court stated that the purpose of the statute "is to encourage litigants to make a good faith effort to settle their case, thereby conserving legal resources and promoting judicial economy."

The Ohio Supreme Court has also stated that Section 1343.03(C) is a vehicle for addressing the unfairness of allowing a tortfeasor to use funds after a cause of action has accrued. In its syllabus in *Digital & Analog Design Corp. v.*

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court determines at a hearing held subsequent to the verdict or decision in the action that the party required to pay the money failed to make a good faith effort to settle the case and that the party to whom the money is to be paid did not fail to make a good faith effort to settle the case.

North Supply Co., 63 Ohio St. 3d 657, 590 N.E.2d 737 (1992),[25] the court stated:

> 1. Prejudgment interest is properly awarded under R.C. 1343.03 on compensatory damages when, because of the failure of a tortfeasor to negotiate in good faith, *it becomes necessary to compensate a plaintiff for delay in receiving compensation* for his injuries, even if that plaintiff has been awarded punitive damages in an amount that otherwise would be sufficient to compensate him for such delay. *(Villella v. Waikem Motors. Inc.* [1989], 45 Ohio St.3d 36, clarified.)[26] (Emphasis and footnote added.)

Other Courts have recognized that Section 1343.03 intends to compensate plaintiffs for the delay in receiving damages.[27]

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[25] Rejected on other grounds by *Zoppo v. Homestead Ins. Co.*, 71 Ohio St.3d 552, 644 N.E.2d 397 (1994).

[26] *Villela* was modified by *Moskovitz v. Mt. Sinai Medical Center*, 69 Ohio St.3d 638, 635 N.E.2d 331 (1994), Syllabus ¶ 2. *Moskovitz* stated that failure to act in good faith is not the equivalent of bad faith.

[27] The Court in *Ellis v. Rugola*, No. 1302, 1987 WL 7180, at *2 (Ohio App. 4 Dist. Mar, 3, 1987), described the equitable considerations which underlie Section 1343.03(C) :

> "High costs and large pretrial outlays are hardly conducive to a 'fair' system of administering the judicial process. Many litigants are keenly aware of the growing costs of litigation and directly rely upon the economic realities to force lower settlements as the legal system more and more becomes a rich man's tool. . . . Making victory expensive is to limit access to the courts. This is an abuse of the system while the abusers are clamoring to be protected, and, when the intent to limit access to the courts results in calculated monetary benefits, the party electing such course ought to be responsible when the opposing side carries the

The *Kalain* court set forth some factors to be considered in determining whether a party has made or failed to make a good faith effort to settle, concluding that a party has *not* so failed

> if he has (1) fully cooperated in discovery proceedings, (2) rationally evaluated his risks and potential liability,

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> proof." (Quoting *Mramor v. Chapman*, 22 Ohio Misc.2d 8, 9, 488 N.E.2d 1257 (1984)).

In *South v. French*, No. C-890187, 1990 WL 67948, at *1 (Ohio App. 1 Dist. May 23, 1990), the Court similarly described the purpose of Section 1343.03(C):

> R.C. 1343.03(C) is intended to remove an unreasonable advantage held by an insurance carrier, particularly when interest rates are high, by which it may benefit from the use of money that should be paid to a party involved in the litigation process. (citing *Kalain v. Smith, supra*).

The purpose of Section 1343.03(C) was similarly described in *Perkins v. Miami Valley Regional Transit Authority*, Nos. 9563, 9696, 1987 WL 5535, at *3 (Ohio App. 2 Dist. Jan. 12, 1987):

> The rationale and purpose behind the concept of prejudgment interest supports our conclusion. The concept of prejudgment interest was enacted by the legislature as a means to promote settlement efforts, to prevent parties who have engaged in tortious conduct from using the judicial process to frivolously delay the ultimate resolution of cases, and to encourage good faith effort to settle outside of a trial setting. *Kalain v. Smith* (1986), 25 Ohio St. 3d, 157, 159. The statute removes some of the advantages of delay for a stakeholder, such as an insurance company, who can continue to use money which should be paid to a plaintiff solely because of the deliberation process. *Mills v. City of Dayton* (1985), 21 Ohio App. 3d 208, 210. The statute seeks to deter defendants who otherwise could force a claimant with a legitimate and real cause of action to file a claim in court, expend large sums of money to hire attorneys, prepare experts, take depositions et cetera, thus driving up the costs of litigation.

> (3) not attempted to unnecessarily delay any of the proceedings, and (4) made a good faith monetary settlement offer or responded in good faith to an offer from the other party.

Kalain, supra, Syllabus. The court added that, "[i]f a party has a good faith, objectively reasonable belief that he has no liability, he need not make a monetary settlement offer." *Id.* "The effect of *Kalain* is to place the burden of proof on a party seeking prejudgment interest." *Moskovitz v. Mt. Sinai Medical Center,* 69 Ohio St.3d 638, 659, 635 N.E.2d 331 *cert. denied*, 513 U.S. 1059 (1994).

> Accordingly, it is incumbent on a party seeking an award to present evidence of a written (or something equally persuasive) offer to settle that was reasonable considering such factors as the type of case, the injuries involved, applicable law, defenses available, and the nature, scope and frequency of efforts to settle. Other factors would include responses — or lack thereof — and a demand substantiated by facts and figures. Subjective claims of lack of good faith will generally not be sufficient. These factors, and others where appropriate, should also be considered by the trial court in making a prejudgment interest determination.

Moskovitz, 69 Ohio St.3d at 659.

At the hearing on this motion, plaintiffs conceded with respect to the *Kalain* factors that Ford had cooperated with discovery and had not engaged in delaying tactics. However, it is plaintiffs' view that Ford did not rationally evaluate the case and, especially, that Ford utterly failed with respect to responding to plaintiffs' good faith settlement offers or making its own good faith offer. Plaintiffs assert that Ford had simply adopted a policy *not* to settle lawsuits wherein plaintiffs were represented by Edgar F. Heiskell III, counsel for the plaintiffs in the instant cases.

Ford, on the other hand, took the position at the hearing that (1) since plaintiffs concede that Ford cooperated in discovery and did not unduly delay the proceedings, that is the end of the analysis since, in its view, failure with respect to all of the factors set forth in *Kalain* must be established by plaintiffs; (2) that, in any event, it had an "objectively reasonable" belief that it was not liable to the plaintiffs and, therefore, did not need to make its own settlement offer; and (3) that plaintiffs' counsel did not negotiate in good faith with Ford.

As a threshold matter, this Court rejects Ford's stance that its cooperation in discovery and in moving the case along is dispositive with respect to the *Kalain* factors. It is disingenuous to argue that such action would insulate a tortfeasor from an award of prejudgment interest, especially in view of the *two*-fold purpose of the statute which includes *both* encouragement of settlement efforts *and* conservation of resources. Only the latter purpose would, arguably, be served by Ford's having cooperated during the pre-trial stages of the case; the former purpose would be completely unsatisfied. If Ford's position were true, all that would ever be required of a defendant to avoid prejudgment interest would be cooperation during discovery. Lawyers could eviscerate Section 1343.03(C) by merely acting professionally.[28]

The Court must decide whether the respective parties made good faith efforts to settle the claims involved in this case.

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[28] The Court's view is supported by *Fiorini v. Whiston*, 92 Ohio App.3d 419, 430-31, 635 N.E.2d 1311 (1993), which stated that to establish that a party acted in good faith "[a]ll four *[Kalain]* criteria must be met." Further, this Court's research has not found, and Ford has not cited, any Ohio case where mere cooperation in discovery or lack of causing undue delay has, by itself, gotten a tortfeasor off the hook with respect to prejudgment interest. Courts routinely examine the question of the good faith efforts of the respective parties when determining whether to award prejudgment interest, without making any mention of other pre-trial actions by the parties or their counsel.

To that end, the following findings of fact are made, gleaned from the evidence presented at the August 24, 1998 hearing.[29] At that hearing, counsel for the plaintiff, Edgar F. Heiskell III, testified regarding his efforts at settling the case. Ford presented the testimony of attorney Edward C. Stewart.

Mr. Heiskell testified that in the summer of 1996 he was contacted by attorney Anthony Tuccillo from Akron, Ohio, who inquired whether Heiskell would be interested in representing Delores Clay and John Strom. At this time, Mr. Heiskell had already been involved in Bronco II litigation since at least 1992. In particular, he had represented a personal friend who had been ejected and seriously injured during a Bronco II rollover, despite having used his seatbelt. Mr. Heiskell settled that case in 1992 or 1993 for "a significant sum" after negotiations with Mr. John Mellen, Ford's in-house counsel. He had subsequently been involved in several more cases before Mr. Tuccillo contacted him about the Clay/Strom matter.

Mr. Heiskell was aware that both Mr. Mellen and Mr. Ed Stewart, another of Ford's counsel, preferred "early evaluation" of cases. Mr. Heiskell thought the Clay/Strom incident lent itself to such evaluation because the rollover accident had been very well documented from the start and the accident vehicle had been preserved.

On August 24, 1996, Mr. Heiskell sent packets of materials to Mr. Mellen to aid in the early evaluation. (*See* Plaintiffs' Hearing Exhibits 1-5). The packets consisted of several letters and attached materials relating to the accident in general[30] and each decedent in particular.[31] A few days later, the

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[29] At the time that this opinion was written, the transcript of the hearing had not yet been filed making reference to the transcript impossible.

[30] This general information included (1) Ohio Traffic Crash Report; (2) Report of Peace Officer re: urinalysis; (3) Towed Vehicle Report; (4) Witness Statement -- Mary Ann Mills; (5) Listing of Witnesses;

packets were supplemented with materials that had not been immediately available. (*See* Pl. Exh. 6 [08/28/96] and Exh. 7 [09/17/96]). In the letters of August 24, 1996, Mr. Heiskell informed Mr. Mellen that he represented Mrs. Clay and Rev. Strom, parents and fiduciaries of the estates of their deceased children who had been killed in a Bronco II rollover on June 18, 1995. He also informed Mr. Mellen that the vehicle had been driven by a third person. Mr. Heiskell urged Mr. Mellen to give the claims "good-faith consideration of settlement [in order to] obviate the need for [] filing civil action complaints[.]" (Pl. Exh.1). Mr. Heiskell supplied Mr. Mellen with drafts of the two complaints which would be filed. At this point, Mr. Heiskell

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(6) Witness Statement -- Lisa Shamshak; (7) Witness Statement -- Edward Mills, Jr.; (8) Diagram Reference Points; (9) Akron Police Dept. D.U.I. Arrest Report; (10) Akron P.D. Fatal Injury Report of June 26, 1995; (11) Akron P.D. Fatal Injury Report of June 19, 1995; (12) Interview of Medical Personnel -- Brenda Krupar; (13) Interview of Medical Personnel -- Grady, Woody, Washington and Willoughby; (14) Akron P.D. Dispatch Card; (15) Akron P.D. Fatal Accident Scene Checklist; (16) Akron P.D. Evidence Report; (17) Traffic Citation No. A 074495; (18) Municipal Court Complaint re Victim Clay; (19) Municipal Court Complaint re: Victim Strom; (20) Coroner's Report re: Kathleen Clay; (21) Coroner's Report re: Christopher Jon Strom; (22) Chain of Custody Form; (23) SmithKline Beecham Lab Report (negative for LSD); (24) Akron P.D. Forensics Lab Report (negative for ethanol); (25) Drug Screen Report/Patient Detail Report for multiple drugs (negative); (26) Drug Screen Report/Patient Detail Report for LSD (negative); (27) Laser Copies of Photo Proofs of Accident Scene Taken by Akron P.D.; and (28) Laser Copies of Photos of Bronco II.

[31] "Each individualized package contain[ed] a descriptive letter introducing the deceased victim and discussing economics relative to the issue of damages; a draft complaint; and a separate letter making a formal demand for settlement." (Pl. Exh. 1 at 2). A demand of $1.2 million was made on behalf of each estate. (Pl. Exh. 4, 5).

was also of the view that both decedents had been wearing their seatbelts and that there had been inertial release.[32]

Mr. Heiskell received no response whatsoever from Ford or its attorneys. On September 17, 1996, he sent a fax to Mr. Mellen asking for confirmation that the package sent on August 24, 1996 had been received and whether Ford intended to make an early evaluation (Pl. Exh. 8). At the hearing Mr. Heiskell testified that he spoke with Mr. Mellen on or about September 23, 1996, and that during that conversation Mellen told Heiskell that Ford did not intend to settle any of his cases because it did not want to "incentivize" him.[33]

By letter dated September 23, 1996, Ford's Claims Analyst Edward Drabczyk thanked Mr. Heiskell for the August 24th letter and asked that several items[34] be provided "as quickly

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[32] This, however, later proved not true and no such claim was ever made to the jury. In fact, the jury was told that the decedents had not been wearing seatbelts although the driver and the front-seat passenger had been. In any event, at this point in the process Mr. Steward informed Mr. Heiskell that one theory of defense which Ford intended to pursue was failure to wear seatbelts, resulting in lack of proximate cause. Heiskell did not see this as a serious obstacle because he was aware that Ford had already lost some cases where victims had been wearing seatbelts.

[33] The date of September 23, 1996 is confirmed by a letter from Heiskell to Mellen dated September 30, 1996 wherein Heiskell makes reference to Mellen's "statement to me *last Monday* that no offers were forthcoming [in two other cases] because Ford did not to 'incentivize' me in pursuing Bronco II claims 'up and down the East Coast[.]'" (Pl Exh. 10, emphasis added). The Court takes judicial notice of the fact that September 23, 1996 fell on a Monday.

[34] The items requested were:

(1) Any reports or records from fire departments, emergency medical services, and other such agencies who responded to the scene of the incident.

as possible" in order "[t]o assist us in a more timely, accurate evaluation of this claim[.]" (Pl. Exh. 9). It is abundantly clear from this request that Mr. Drabczyk had never looked at the materials sent by Mr. Heiskell on August 24, 1996. *Compare* listing in Note 30 with listing in Note 34.

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(2) All documents reflecting repairs service and maintenance of the vehicle.

(3) Copies of all photographs and videotapes of the vehicle and accident scene.

(4) All documents regarding purchase of the vehicle.

(5) The names, address and telephone numbers of persons with knowledge of relevant facts.

(6) The current location of the vehicle and whether or not it is available for inspection by Ford.

(7) Has the vehicle been examined by any independent experts engaged by you? If so, by whom?

(8) Please be kind enough to forward us any expert reports in your possession in support of your position that there was a defect in the vehicle in question.

(9) All documents related to any insurance claims or benefits as a result of the incident including any investigative and appraisal reports.

(10) A detailed description of the events surrounding the incident, the alleged defect, and the damage amount.

(11) A detailed description of prior accidents involving this vehicle, including the parties involved and damages to the vehicle.

(12) All documents supporting damages including settlement demand.

(13) Any other documentation that might assist Ford in evaluating this claim. (Pl. Exh. 9).

On September 30, 1996, Mr. Heiskell wrote again to Mr. Mellen to advise that he was filing wrongful death lawsuits that day on behalf of the Clay and Strom estates. He stated: "Two events have occurred which have led me to conclude that Ford is not making, and cannot be counted upon to make, a ***bona fide*** effort to evaluate these claims for settlement prior to trial." The first event related to two other cases where Mr. Heiskell represented plaintiffs.[35] The second related to the Clay/Strom matter and was set forth by Mr. Heiskell as follows:

> The second event is the form letter I received from Edward Drabczyk of Ford's Office of General Counsel on September 28. Although Mr. Drabczyk acknowledges (30 days after it was sent to your office) receipt of my letter of August 24, his listing of requested documents completely ignores the 28 separate documents (including police reports, witness statements, drug/alcohol screen reports, medical personnel interviews and the more than 50 laser copies of photographs) that were sent to you.
>
> Thus, it is clear to me that Ford has no intention of making an early evaluation of settlement possibilities of these claims, nor could my clients expect any settlement proposal to be reasonable, given Ford's stated intentions and actions.
>
> You will soon see that Ford's efforts to avoid "incentivizing" me by making fair and reasonable efforts to settle those cases which are amenable to settlement has had an effect precisely opposite that which was apparently intended.

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[35] With respect to these cases (*Gamblin* and *Asterino*) he referred to a conversation which he had had with Mr. Mellen the previous Monday wherein Mellen had stated that "Ford did not want to 'incentivize' [him] in pursuing Bronco II claims 'up and down the East Coast[.]'" (Pl. Exh. 10).

(Pl. Exh. 10). On August 7, 1997, Mr. Heiskell corresponded with Ford's local counsel, Elizabeth B. Wright.[36] (Pl. Exh. 11). He sent Ms. Wright the reports of a C.P.A. regarding the net present value of the lost income capacity of the two decedents. Mr. Heiskell also reminded Ms. Wright that he had suggested to Mr. Stewart that the case might be mediated but that he never got a response.

On August 12, 1997, Mr. Heiskell faxed a message to Mr. Stewart, apparently in response to Stewart's request for settlement figures for each of the cases where Mr. Heiskell represented plaintiffs. (Pl. Exh. 12, 13). In that correspondence, Heiskell indicated that the Clay and Strom cases could be settled for $750,000.00 each. Heiskell also noted that he had been trying to communicate with Mr. Mellen "in recent weeks, to no avail." On cross-examination, when asked why this settlement demand, which was supposed to be "global," did not include the *Goff II* litigation,[37] Mr. Heiskell

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[36] By this date, Ford had already filed a Third Party Complaint against the driver of the vehicle, William R. Slonsky. (*See* Docket No. 13). Attorney Donald P. Wiley appeared on behalf of Slonsky on March 25, 1997. (*See* Docket No. 16). However, extensions were granted for the filing of an answer. Slonsky's Answer was filed on April 25, 1997, joined with a Counterclaim against Ford. (*See* Docket No. 22). Ford answered the counterclaim on May 5, 1997. (*See* Docket No. 24). The next day, May 5, 1997, the Court conducted the second status conference. At that conference, plaintiffs' counsel represented that they would undertake Slonsky's representation and would prosecute his counterclaim. (*See* Order, May 5, 1997, Docket No. 25).

[37] There were two *Goff* cases. In the first, plaintiff Goff settled with Ford in 1993 or 1994 for $400,000, apparently because of the strength of the position of Ford's expert, David Bickerstaff. Goff was only the second Bronco II plaintiff that Mr. Heiskell had represented. Mr. Heiskell later had reason to believe that Ford had paid Bickerstaff to perjure himself and/or had purposefully withheld two critical documents. Therefore, a second *Goff* case was brought, a putative

stated that he was under the impression that Ford had no intention to settle *Goff* under any circumstance and that he, therefore, did not include a demand for that case. Mr. Stewart apparently called Heiskell and asked for a figure for *Goff*. Heiskell said it had to be at least $1 million. Since that was out of the question, the global settlement never occurred because Ford took a "settle all or settle none" position.

On January 9, 1998,[38] Mr. Heiskell wrote again to Mr. Stewart with a "global" settlement demand. (Pl. Exh. 14). This time, he asked for only $550,000 for each estate. Mr. Heiskell urged Ford to see these demands as "eminently fair and reasonable[.]" He further noted that

> [b]y settling now, Ford will be (1) avoiding at least $2 million in litigation costs, (2) avoiding the likelihood of unfavorable published opinions in *Gamblin, Moya* and *Martin*, (3) eliminating the possibility that one or more of these cases could result in a runaway verdict involving huge punitive damages, and (4) getting rid of tens of millions in contingent liabilities.

Apparently, there was no response from Mr. Stewart, although the offer of settlement remained open until January 16, 1998.

Finally, on May 5, 1998, after the second day of the trial, plaintiffs and Slonsky presented a demand to Mr. Stewart via the front desk of Stewart's hotel in Cleveland, Ohio. (Pl. Exh. 15). Each estate demanded $1.5 million, and Slonsky demanded $500,000. These offers were to remain open "to and until such

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class action on behalf of two classes: persons who had settled trials on the strength of Bickerstaff's expected testimony and persons who had lost after trials where Bickerstaff testified. *Goff II* is still pending, although not as a class action, awaiting a ruling on Ford's motion for summary judgment.

[38] At this time, the Court had already set a trial date for May 4, 1998.

time as the Court has ruled on motions at the conclusion of plaintiffs' case[.]" There was no response from Mr. Stewart.[39]

When examined by Mr. Grisi, Slonsky's counsel, Mr. Heiskell stated that in August of 1997, when he was consulting with Mr. Stewart regarding settlement of the *Clay/Strom* cases, he was Slonsky's counsel of record. (*See* Order of May 6, 1997, Docket No. 25; Attorney Appearance by Grisi, April 16, 1998, Docket No. 45).

On cross-examination, Mr. Heiskell admitted that May 5, 1998 was the first time an express settlement demand had been made on behalf of Slonsky; however, he stated that he always contemplated (at least once Slonsky was brought into the case by Ford) that Slonsky would be included in any settlement. He did admit that he never told Mr. Stewart that.

At the hearing, Mr. Heiskell testified that, in a class action in the U.S. District Court for the Eastern District of Louisiana, Ford had been required to disclose the number of Bronco II cases it had settled, as opposed to tried. Through December of 1994, Ford had settled 334 cases, whereas it had tried 13 cases, of which it had prevailed in 10. Heiskell believes that the number of settled cases has now increased to over 400. Of the 21 lawsuits filed by Mr. Heiskell on behalf of various plaintiffs throughout the country, 13 have been settled. Although his memory of the dates of settlement was not precise at the hearing, Mr. Heiskell estimated the following dates:

Diaz v. Ford, Circuit Court of Monongalia County, West Virginia — December, 1993

Goff v. Ford, Circuit Court of Kanawha County, West Virginia — July, 1994

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[39] On re-cross-examination, Mr. Heiskell stated that between the liability and damages phases of the trial, the demand for settlement for the entire case increased to $20 million.

Cochran v. Ford, Circuit Court of Kanawha County, West Virginia — Spring, 1995

Hickman v. Ford, Circuit Court of Kanawha County, West Virginia — Spring, 1995

Jackson v. Ford, Middle District of Florida — 1995, possibly 1996

Young v. Ford, Northern District of West Virginia — May or June, 1996[40]

Bennett v. Ford, Eastern District of Virginia — Summer, 1996

Mojher v. Ford, Southern District of West Virginia — Summer 1996[41]

Dillon v. Ford, Southern District of West Virginia — November 1996

Rhodes v. Ford, Court of Common Pleas, Kershaw County, South Carolina — before the end of 1996

Asterino v. Ford, Southern District of Ohio — Spring, 1997

Wren v. Ford, Southern District of West Virginia — August 1997

Cassella v. Ford, District of Massachusetts — April 9, 1998

Therefore, of the 13 of Mr. Heiskell's cases which Ford has settled, eight (8) settled before September 23, 1996 (the day the non-"incentivize" policy was articulated) and five (5) settled since then. In addition, Mr. Heiskell testified that he has

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[40] This case involved a Ford Ranger pickup truck.

[41] Mr. Heiskell clarified this by stating that this actually could have settled as early as late 1993 and as late as mid-1995.

actually gone to trial against Ford a few times: (1) the *Gamblin* case which resulted in a mistrial in early 1996 and was re-tried to a defendant's verdict in May of 1997; the case is now on appeal; (2) the *Martin* case which was tried to a plaintiff's verdict in November of 1997, but where the judge granted JNOV, a decision which is now under reconsideration on plaintiff's motion; and (3) the *Clay* and the *Strom* cases in this Court.

On cross-examination, Mr. Heiskell acknowledged that he has solicited cases from persons whom he knows to have been involved in Bronco II accidents. For example, the *Hickman* and *Martin* cases originated in that manner. Heiskell noted that the letters to Mr. Hickman and Mr. Martin were labeled "advertising material." (Def. Exh. G, H).

Mr. Heiskell also acknowledged on cross-examination that he had "threatened" (Ford's word) to go to the media, to write to the National Highway Traffic Safety Administration ("NHTSA"), to do a nationwide case solicitation, to brief attorneys for insurance companies regarding the possibility of subrogation rights with respect to Bronco II rollover accidents for which they had paid claims, and to contact attorneys general throughout the United States about the possibility of lawsuits to recover state funds paid out for medical costs resulting from Bronco II rollovers. He did, in fact, contact NHTSA (*See* Def.

Exh. I)[42] and his own insurance company, State Farm. *(See* Def. Exh. M).[43]

Although no one used the word at the hearing, it was clear that Ford was implying that Mr. Heiskell was attempting to "blackmail" it into settling his cases. Mr. Heiskell was steadfast that he did not view his communications as "threats" since he had actually acted upon some of them, but that he was and still is trying to get Ford to acknowledge its "arrogance" in having a policy not to settle any of Heiskell's cases.[44]

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[42] Mr. Heiskell wrote to the Administrator of NHTSA requesting that the Bronco II investigation conducted between 1983-90 be re-opened because Ford had "conceal[ed] the Bronco II rollover defect which is killing and maiming thousands of American men, women and children." (Def. Exh. I). He further stated: "We do not yet know the extent, if any, to which your predecessors at NHTSA may have been in complicity with Ford and ignored the evidence that Ford was engaged in a massive cover-up of the Bronco II problem." (*Id.*). He stated that if NHTSA were to "default in discharging . . . its solemn duty, our next recourse would be to ask Congress to convene a hearing on the whole sordid affair." (*Id.*).

[43] A fax from Mr. Heiskell to Mr. Stewart dated January 22, 1998, stated: "Your client's arrogance has its consequences. Someday, someone on Ford's board of directors is going to question John Mellen's judgment in inviting this kind of problem." (Def. Exh. M). The "problem" referred to was laid out in an attached copy of a fax Heiskell had sent to Charles Stuckey of State Farm Insurance Co. wherein he explained his view that"State Farm can and should recover its losses against this $27 Billion-a-year automaker that has tried to deceive everyone about the rollover propensity of this popular sport utility vehicle [the Bronco II]." (*Id.*).

[44] In fact in a January 16, 1998 fax with an angry tone addressed to Mr. Stewart, Mr. Heiskell stated:

> I very much regret that Ford has elected to make no response to my offer to settle the various cases in my inventory.
>
> You had led me to believe that Ford "is always interested"

Also on cross-examination, Mr. Heiskell admitted that during their exchanges regarding the possibility of settling the *Clay/Strom* cases, Mr. Stewart told him, *inter alia*, that Ford intended to rely on the following defenses: (1) that the decedents were not wearing seatbelts, which was the proximate cause of their deaths; (2) that an EMS worker would testify that the driver told her he had been suicidal; (3) that Strom and others in the vehicle were using LSD;[45] 4) that the decedents were emancipated, unemployed adults with no claims for past or future lost wages; (5) that there is no evidence of conscious pain and suffering of either decedent; and (7) that the only basis for damages is the grief of the surviving family members.[46]

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in settling cases; however, Ford's failure to make any counter-proposals whatsoever in *any* of the cases makes it clear that it has another agenda in mind.

As consequences of what I consider to be Ford's bad faith, you can expect me to follow thru [sic] with the measures I specifically described for you last week. I will be joined by several firms not previously involved in Bronco II litigation.

You'll want to budget your time wisely. Ford's going to have much to which to respond, beginning with new motions to compel. OGC [Office of General Counsel] makes the tobacco executives look like a bunch of boy scouts.

(Def. Exh. L).

[45] The Court notes, however, that there is absolutely *no* evidence in the record that Slonsky or either of the decedents were using LSD, even though there was the admission that the front seat passenger, whose mother owned the Bronco II, was using it. In effect, Slonsky was the "designated driver."

[46] This, however, is an element of damages under Ohio's wrongful death statute. The addition of this element to the statute in the early 1980s significantly changed the nature of wrongful death actions in Ohio.

Ford's only witness at the hearing on August 25, 1998 was Mr. Edward Stewart. He insisted that he had always told Mr. Heiskell that each of his cases would be separately examined on both its factual and legal basis with respect to settlement possibilities. He was of the view that plaintiffs here were never reasonable in their demands because they never presented "facts and figures" to substantiate the monetary amounts.

The Court notes that, although Ford's General Counsel Mr. Mellen was admittedly the ultimate decision-maker with respect to settlement of the *Clay/Strom* cases, Ford opted not to present him as a witness at the hearing and had previously vigorously resisted post-verdict attempts by the plaintiffs and the counter-claimant to depose Mellen in order to explore the question of Ford's good faith.

Having considered the testimonial evidence and the parties' respective arguments, the Court is of the view that the plaintiffs, Delores Clay and John Strom, have established that they acted in good faith to try to settle their cases from early on *and* that Ford failed to act in good faith in its refusal to make any offer of settlement prior to the commencement of the trial.[47]

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[47] Before the trial commenced, Ford's counsel were on notice from its own seatbelt expert that there was no evidence to suggest that Slonsky, the alleged suicide driver, was not wearing a seatbelt. Moreover, Lance (the frontseat passenger) and a driver who was closely following the Slonsky vehicle, had given vivid pretrial testimony by way of deposition that she had stopped Slonsky from jumping off an overpass in his post-accident attempt to commit suicide. The reliance of Ford upon the EMS worker who arrived at the scene later about the alleged pre-accident suicide efforts of Slonsky was simply not credible and that fact should have been obvious to Ford's counsel prior to the commencement of the trial. Ford's reliance on the EMS worker's testimony concerning suicide on the part of Slonsky does not in this Court's view qualify as a good faith basis for failing to make an offer of settlement. The first offer of settlement by Ford came after the jury, in the bifurcated

They are each entitled to prejudgment interest pursuant to Ohio Rev. Code § 1343.03).03(C) and the same shall be awarded. Accordingly, Docket No. 142 is GRANTED.

On the other hand, there is no proof that counter-claimant Slonsky made timely good faith efforts to settle his counterclaim. When he finally did make an actual demand during trial, there is no evidence that Ford failed to act in good faith by not accepting his offer. By that time, the record already suggested possible conflicting testimony regarding his purported suicide attempt(s). It was not unreasonable for Ford to take the position that the jury might believe its evidence and disbelieve Slonsky's evidence. Slonsky is not entitled to prejudgment interest. Accordingly, Docket No. 145 is DENIED.

The Court now turns to the calculation of the prejudgment interest in the event either or both plaintiffs elect to accept the remittitur. The prejudgment interest will be calculated on the net judgment for each of the two estates. With the acceptance of the remittitur, the Strom estate will be entitled to the sum of $4,850,000.00 plus the prejudgment on that amount. With the acceptance of the remittitur, the Clay estate will be entitled to the sum of $3,850,000.00 plus the prejudgment interest on that amount.

Under Ohio law, prejudgment interest is calculated at 10% per annum from the date of the event to the date of the judgment. As the former date is June 18, 1995 and the date of the judgment was May 29, 1998, the period of time for the calculation is 20 days short of three years. To compute the interest, the Court has divided 20 by 365 and the result is 0.0548. The annual interest for the Strom estate, assuming the remittitur is accepted, is $485,000.00. Multiplying that number by 0.0548 leads to the sum of $26,578.00 which will be subtracted from $1,455,000.00, which is three years' interest.

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proceeding, had found against Ford on the issue of liability.

The total prejudgment interest that will be awarded the Strom estate will be S1,428,422.00, in the event the remittitur of $2,000,000.00 is accepted, for a total revised judgment of $6,278,422.00.

The annual interest for the Clay estate, assuming the remittitur is accepted, is $385,000.00. Multiplying that number by 0.0548, which represents the fraction created by dividing 20 by 365, leads to $21,098.00 which will be subtracted from $1,115,000.00, which is three years' interest. The total prejudgment interest that will be awarded the Clay estate will be $1,133,902.00, in the event the remittitur of $3,000,000.00 is accepted, for a total revised judgment of $4,983,902.00.

IV. Summary Conclusion re: Docket Nos. 142, 145, 148, 149

Ford's motion for judgment as a matter of law (Docket No. 149, Part 1) is DENIED. Further, Ford's motion for a new trial as to liability (Docket No. 149, Part 2) is DENIED.

Ford's motion for new trial on damages as to Slonsky is DENIED, conditioned on Slonsky's acceptance of a remittitur in the amount of $2,000,000.00 for a resulting damages judgment against Ford Motor Company in the amount of $1,500,000.00. Failing such acceptance, Ford's motion for a new trial on Slonsky's damages will be granted. (Docket No. 148, parts I and 2).

Plaintiffs Delores Clay and John Strom, as administrators for the estates of their respective decedents, are each entitled to prejudgment interest at ten percent (10%) per annum pursuant to Ohio Rev. Code § 1343.03(C). Accordingly, Docket No. 142 is GRANTED.

Ford's motion for new trial on damages as to the estate of Christopher Strom is DENIED, conditioned on acceptance of a remittitur in the amount of $2,000,000.00, for a resulting damages judgment of $5,000,000.00 less the $150,000.00 already received from other sources, for a total final judgment

against Ford Motor Company in the amount of $6,278,422.00, which includes prejudgment interest in the sum of $1,428,422.00. Failing acceptance of the remittitur, Ford's motion for a new trial on compensatory damages for the estate of Christopher Strom will be granted. (Docket No. 148, parts 1 and 2).

Ford's motion for new trial on damages as to the estate of Kathleen Clay is DENIED, conditioned on acceptance of a remittitur in the amount of $3,000,000.00, for a resulting damages judgment of $4,000,000.00, less the $150,000.00 already received from other sources, for a total final judgment against Ford Motor Company in the amount of 4,983,902.00, which includes prejudgment interest in the sum of $1,133,902.00. Failing acceptance of the remittitur, Ford's motion for a new trial on compensatory damages for the estate of Kathleen Clay will be granted. (Docket No. 148, parts 1 and 2).

Counter-claimant William R. Slonsky is not entitled to prejudgment interest. Accordingly, Docket No. 145 is DENIED.

The Court has prepared documents to be executed by the plaintiffs and by the counterclaimant Slonsky in which the remittitur is either accepted or rejected. Those documents are attached as Appendices 1, 2, 3, 4, 5 and 6. The Court requests that the plaintiffs Strom and Clay and the counter-claimant Slonsky file either an acceptance or rejection of the remittitur by no later than September 11, 1998.

If one or both plaintiffs Strom and Clay or counter-claimant Slonsky fall to respond by either accepting or rejecting the remittitur by 4:00 p.m. Monday, September 14, 1998, the Court will grant the defendant Ford Motor Company a new trial as to the non-responding party on the issue of compensatory damages.

IT IS SO ORDERED.

/s/ David D. Dowd, Jr.
U.S. District Judge

APPENDIX E

98-4230
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DOLORES CLAY, AS ADMINISTRATRIX OF THE ESTATE OF KATHLEEN P. CLAY, ET AL.,	)	
Plaintiffs-Appellees,	)	
v.	)	ORDER
FORD MOTOR COMPANY, A DELAWARE CORPORATION,	)	
Defendant-Appellant,	)	
WILLIAM R. SLONSKY,	)	
Defendant-Appellee.	)	

BEFORE: RYAN, MOORE, and GIBSON,[1] Circuit Judges.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully

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[1] Hon. John R. Gibson, Senior United States Circuit Judge for the Eighth Circuit Court of Appeals, sitting by designation.

considered upon the original submission and decision of the case. Accordingly, the petition is denied. Judge Ryan would grant rehearing for the reasons stated in his dissent.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green, Clerk

Filed: Aug. 15, 2000

(2)

No. 00-497

Supreme Court, U.S.
FILED
NOV 1 2000
CLERK

IN THE

Supreme Court of the United States

FORD MOTOR COMPANY,

Petitioner,

v.

DOLORES CLAY, as Administratrix of the Estate of KATHLEEN P. CLAY, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENTS DOLORES CLAY AND JOHN D. STROM

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I. CLARIFICATION OF PETITIONER'S STATEMENT

Petitioner Ford Motor Company ("Ford") cloaks its dissatisfaction with an adverse jury verdict and affirmance in a conjured issue of general import. This Court has already established the standard under Rule 702 of the Federal Rules of Evidence for admitting expert testimony and directed that the district courts be given broad discretion to assess the reliability of such testimony. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993); *General Elec. Co. v. Joiner*, 522 U.S. 136 (1997); *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999). Reaching to capture this Court's attention, Ford obscures the fact that the trial court exercised its discretion on a record establishing that: (1) Plaintiffs' expert relied on the results of vehicle tests performed by Ford's own engineers; (2) Ford never challenged the expert's principle that dynamics can be used to analyze vehicle designs and predict their motion; and (3) Ford waived its opportunity to conduct a voir dire examination of plaintiff's expert, declined the opportunity to question him about his areas of expertise before he testified, and elected to challenge the expert solely on cross-examination.

Faced with a record supporting the reliability of the expert's methodology and the trial court's admission of his testimony, Ford is left to urge that this Court find an abuse of discretion any time a trial judge fails to make specific findings on the record reflecting the extent of the *Daubert* analysis and detailing the reliability determination. This Court having held just last year that the trial court's discretion "applies as much to the trial court's decisions about how to determine reliability as to its ultimate conclusions," *Kumho Tire*, 526 U.S. at 152, Respondents Dolores Clay and John D. Strom ("Plaintiffs") submit that the petition should be denied.

A. The Record, Which Included Tests By Ford's Own Engineers, Supported The Reliability Of Plaintiffs' Expert's Testimony That The Bronco II's Defective Design Caused The Fatal Roll.

1. The Fatal Roll Of The Bronco II

On June 18, 1995, 18-year-old Kati Clay and 26-year-old Chris Strom were killed when the Ford Bronco II in which they were riding rolled over on Interstate 77 in Akron, Ohio. C.A. App. at 979, 1067, 1069-73, 1080-82, 1087, 1089, 1090, 1092, 1094-98. According to Ford's statistical expert at trial, the two-wheel drive Bronco II has the second worst rollover rate of all sport utility vehicles ("SUV"). *Id.* at 1658-59.

The driver was William Slonsky. At 50 to 60 m.p.h., he executed a routine lane change to the right to avoid a vehicle approaching rapidly from the rear. He thereafter returned to the previous lane to avoid a slow moving vehicle. C.A. App. at 1071. When Slonsky made the lane change, the vehicle "overcorrected" itself and began to slide sideways. *Id.* at 1071-72. The vehicle then went up on two wheels, its passenger-side wheel rims gouged into the pavement and the vehicle began to roll. *Id.* The vehicle rolled two and three-quarters or three and three-quarters times, coming to rest on the driver's side about 235 feet from the end of the gouges. Pet. at 3a. Kati Clay and John Strom were both thrown from the Bronco II as it rolled. *Id.* Strom died on the scene from his injuries and Clay later died at a nearby hospital. *Id.*[1]

1. Attempting to deflect attention from the evidence of the Bronco II's defective design, Ford persists in mentioning passenger Sean Lance's use of LSD. There was no evidence that the *driver*, Slonsky, was on LSD or any other drug. *See* C.A. App. at 1102-03. Indeed, Slonsky's urinalysis following the accident produced negative results for alcohol and/or drugs. Pet. at 3a. In another feint, Ford refers to recent repairs to the Bronco II. There was no evidence, however, that recent repairs to the Bronco II had anything to do with the accident. C.A. App. at 1110.

2. The Bronco II's High Rollover Rate

At trial, Plaintiffs introduced testimony from Ford's engineers involved in the designing and testing of the Bronco II, as well as Ford's internal documents, statistics, test data and memoranda, to establish that the Bronco II's design defects caused its dangerous propensity to roll. *See, e.g.*, C.A. App. at 350-56, 368, 1155-65, 1658-60, 1185-89; Pet. at 38a-41a, 46a-47a. For example, Plaintiffs introduced an internal Ford document that listed the number of "first event rollovers" by SUV make and model. C.A. App. at 1139-43. A "first event" rollover is one not preceded by another collision. *Id.* at 1138. This June 23, 1988 document, entitled "Current Safety Issues Meeting with 'Red' Poling,"[2] which was based on federal Fatal Accident Reporting System ("FARS") statistics, demonstrated that the first-event rollover rate of the Bronco II was nearly three (3) times that of the Chevrolet S-10 Blazer. *Id.* at 361-67, 1139. Dr. Melvin Richardson, Plaintiffs' expert, testified regarding another Ford document that contained Ford's own internally-generated statistics and showed that the first-event rollover rate of the Bronco II was over three (3) times that of the Suzuki Samurai, about five (5) times that of the Chevrolet S-10 Blazer, and about ten (10) times that of the Jeep Cherokee. *Id.* at 1140.

Ford's statistical expert, Michelle Vogler, admitted that SUVs, among all classes of motor vehicles, have the highest rollover rates. C.A. App. at 1658-59. It was she who testified that the two-wheel drive Bronco II has the second worst rollover rate of all SUVs. *Id.* at 1658-59.[3] She added that, based on her

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2. In June 1988, Red Poling was the chief executive officer of Ford. C.A. App. at 1134.

3. Only the Isuzu Amigo has a rollover rate higher than that of the two-wheel drive Bronco II. C.A. App. at 1658.

examination of accident numbers from six states for an average period of 7.8 years, two- and four-wheel drive Bronco IIs were involved in 5,672 rollover accidents. *See id.* at 1654. She also testified that the Bronco II's rollover rate was twice that of the Chevrolet S-10 Blazer and four times that of the Jeep Cherokee. *See id.* at 1660.

3. Ford Chose A Lesser "Stability Index" For The Bronco II

According to Ford's veteran mechanical engineer, Fred Parrill, Ford recognized the need to improve the "stability index" of the Bronco II as early as February 5, 1981. C.A. App. at 1036, 1039.[4] Parrill testified unequivocally that stability index is an important indicator of a vehicle's safety:

> The vehicle dimensions or characteristics that make up the stability index are important vehicle characteristics that certainly can have an effect on the vehicle's performance.
>
> There is a directional relationship between the stability index and rollover propensity of a vehicle. The higher the stability index, there will be less of a rollover propensity.

C.A. App. at 1038-39.

Parrill noted that a February 5, 1981 Ford report had articulated a goal of raising the Bronco II's stability index " 'from 1.85 to a maximum achievable of 2.25 without a totally new concept vehicle.' " C.A. App. at 332, 1039. Ford's

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4. "Stability index is a ratio involving the track width of the vehicle and the height of the [vehicle's] center of gravity." C.A. App. at 1038. "Track width" is the distance between the front wheels of a vehicle, measured from the center of each wheel. *See id.* at 1042-43.

engineers advanced five proposals to improve the stability index. *Id.* at 332, 1039-40. Ford chose the second proposal, which marginally raised the stability index from 1.85 to 1.98 or 2.03, even though Proposals Three through Five yielded a higher stability index. *Id.* at 1040-41. Ford's engineers considered that the higher stability index of 2.25 was achievable. *Id.* at 1039-41. Ford chose to pursue the lower stability index.

4. Ford's Choice Was Driven By Its Production Target Date

Parrill stated that Ford chose Proposal Two to avoid a delay in the so-called "Job One" date (mass production target date): "Proposals One and Two would not [have] affected the timing of Job One[;] however, proposals Three, Four and Five involved widening the vehicle track and lowering the center of gravity and would have involved significant vehicle tear-up and a potential delay in achieving the Job One date." C.A. App. at 332, 1039-40.[5] Changing it would have "major or significant consequences." *Id.* at 1038.

Ford established the January 1983 Job One date with knowledge that Chevrolet intended to produce the S-10 Blazer by 1982. C.A. App. at 1037. Another Ford engineer, James McClure, who was responsible for the ride and handling aspects of the Bronco II's development, testified that the decision to increase the track width by three to four inches "would most likely cause a delay in Job One and Ford knew that Chevy was coming out with the S-10 Blazer in the early fall of 1982." *Id.* at 1051. McClure explained that widening the Bronco II would require alterations to the vehicle's sheet metal, "and the

5. Parrill also quoted from a Ford interoffice memorandum which stated that " '[t]he program cost, weight and investment status would almost certainly increase' " if the decision were made to widen the Bronco II. C.A. App. at 1042-43.

lead time for the changes in the sheet metal design was at least one year." *Id.* at 1050.[6] Increasing the Bronco II's track width by two inches also would have required modification of the vehicle's axles. *Id.* at 1053.

McClure further testified that, from March 1982 through May 1982, Ford's engineers on three or four occasions "recommended at least a two-inch track width increase for the Bronco II." C.A. App. at 349, 1051. In March 1982, the suspension and steering design departments reported that the Bronco II contained " '[c]ritical handling problems.' " *Id.* at 349, 1051. Improvement of the Bronco II's stability was the sole reason for the proposals by Ford's engineers to widen the Bronco II's track width. *Id.* at 1053. "Management considered the request [for a two-inch track width increase] but the changes were not made." *Id.* at 1051. As to handling, Ford's engineers concluded that the prototype Bronco II's handling characteristics " '[r]equire[d] improvements in directional stability, *lane changes*, *roll control* and cornering.' " *Id.* at 347-48, 1040 (emphasis added).

5. Ford Halted Driver Testing Of Bronco II "J-Turns"

Ford halted "J-turn" testing of the Bronco II in 1982 out of concern for the safety of Ford's test drivers. C.A. App. at 1049-50.[7] This concern stemmed from an incident in which a Bronco

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6. Another reason for Ford's decision not to widen the Bronco II was its "desire to keep the vehicle narrow in order to be able to market the Bronco II in Japan." C.A. App. at 1050-51.

7. McClure testified that "J-turn" testing involves driving a vehicle on a test track at a given speed, then turning the steering wheel a predetermined amount (e.g., 360 degrees) and holding the wheel at that point. C.A. at 1057. Outrigger contact will not occur unless at least one wheel lifts off the ground. *Id.* at 1041. Mr. Parrill testified that outriggers are devices installed on vehicles "to allow the test drivers to test the limits of the vehicles within test parameters and to prevent the vehicle from actually rolling over." *Id.* at 1041-42.

II rode up on two wheels, the outrigger failed and dug into the road, and the Bronco II "[p]ole vaulted . . . over." *Id.* at 1049-50. Parrill testified that "[t]he tests were to determine what effects wheel size, spring rates, tire type and size, et cetera, had on the Bronco II during J-turn maneuvers. The results were that outrigger contact occurred on every test run at speeds over 25 miles an hour." *Id.* at 350-56, 1041.

Ford conducted no more J-turn testing with human drivers on road surfaces from April or May 1982 to the inception of production. C.A. App. at 1043.[8] Instead, it used computer model testing with no one at risk. *Id.* at 1043-44. To Parrill's knowledge, no automaker had ever before used computer modeling and testing "for sign-off testing purposes." *Id.* at 1044. McClure agreed that the Bronco II program was the first to use computer modeling and testing in place of road testing to evaluate rollover stability. *Id.* at 1059-60.

6. Ford Used Lead Shot Instead Of Crash Test Dummies

In a video prepared for use in defending product liability cases, Ford used lead shot in the demonstrations instead of crash test dummies to simulate passengers. C.A. App. at 1062.[9] McClure admitted that the placement of 150 pounds of shot in the right front floorboard area in place of crash test dummies did not fairly characterize the positioning of a human being seated in the right front seat. *Id.* at 1055. McClure also stated

8. In fact, McClure testified that Ford subjected the Bronco II to J-turn testing through May 1982 (at which time, as noted above, concerns over driver safety caused a halt), then did not resume such testing until May 1989. C.A. App. at 1049.

9. During questioning regarding J-turn testing, McClure conceded that Ford had available to it, but failed to use, crash test dummies which could have simulated the weight and position of actual passengers. C.A. App. at 1055.

that the Bronco II's center of gravity was above its floorboards, and conceded that the placement of shot bags on the floorboards loaded the Bronco II below its center of gravity. *Id.* at 1056. Plaintiffs' engineering expert, Dr. Melvin Richardson, made clear the profound impact that altering the center of gravity had on the validity of the testing: "If people are placed in the vehicle they'll sit higher than this load is, and the vehicle will be *much more likely* to roll over with people in it than it would be if it were loaded this way." *Id.* at 1200-01 (emphasis added).

7. Ford Chose Not To Decrease Wheel Size Or Increase Track Width

Parrill testified that one of the conclusions in an April 28, 1982 engineering report was that " '[a] significant improvement in J-turn handling can be achieved on the Bronco II by releasing [the vehicle with] 14-inch wheels or increasing track width three to four inches.' " C.A. App. at 1042. Nevertheless, "[t]he Bronco II was produced and sold with 15-inch wheels and the track width was never increased three to four inches," notwithstanding the technical feasibility of these improvements. *Id.* at 1042.[10] No significant changes were made to the length, center of gravity, or width of the Bronco II prototype from the time of the April 1982 engineering report to the time production of the Bronco II commenced. *Id.* at 1043. The changes to the Bronco II prototype during this period were "cosmetic." *Id.* at 1044-45.[11]

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10. Another Ford report evaluating the Bronco II's handling reiterated that 14-inch wheels significantly improved the Bronco II's handling. C.A. App. at 350. Dr. Richardson testified (as Parrill did) that Ford never sold the Bronco II with anything other than 15-inch wheels. *Id.* at 1166.

11. McClure testified, for example, that Ford increased the capacity of the gasoline tank from 17 to 23 gallons and added skid plates beneath the transfer case and the gasoline tank. C.A. App. at 1059.

8. Ford's Choice Of The Twin I-Beam Suspension Reduced The Bronco II's Stability

Ford chose a "Twin I-beam" suspension for the Bronco II. C.A. App. at 1143.[12] Dr. Richardson testified that such a suspension has a "fairly high roll center." C.A. App. at 1147-48. A consequence of Ford's choice of suspension is a dynamic problem known as "jacking" that exacerbates the low stability index. The phrase describes a phenomenon in which the Bronco II actually becomes taller and narrower in certain turning maneuvers. *Id.* at 1147-48. In a small vehicle, the problem can become "a very serious and significant problem." *Id.* at 1149. Ford could have chosen, but did not choose, the SLA or the McPherson strut suspensions, which do not have the jacking problems associated with the Twin I-beam. *Id.*

Ford's own test documents confirm the problem known as "jacking." One, entitled "Investigation into 'Jacking Effect' on front swing axle using '88/'89 Bronco II vehicles [a]s it relates to vehicle rollover," reflected tests by Ford on a production-level Bronco II in which jacking produced a 40 millimeter decrease in track width and a 25 to 26 millimeter height increase in the center of gravity. C.A. App. at 368, 1185-86. Another Ford study, based on actual comparison testing, concluded that the production-level Bronco II suffered from jacking measured at *ten times* that of the Chevrolet S-10 Blazer. *Id.* at 371, 1187-89.

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12. McClure testified that "[t]he Twin I-beam was another of the package constraints that Ford management provided to the engineers as a hard point for the vehicle." C.A. App. at 1060. A "hard point" was a proposed design feature of the Bronco II that Ford was unwilling to alter. *Id.* McClure testified further that the Twin I-beam "hard point" worsened the Bronco II's stability index. *Id.*

William Slonsky, the driver of the Bronco II in the present case, confirmed what Ford's engineers were saying in 1982:

* * *

A. When I made this lane change I felt something go wrong with the handling of the vehicle, and I went to correct it, and the car overcorrected itself. I tried to maintain control of the car, I could not and the car started to roll. . . .

Q. When you felt that the car was mishandling and you overcorrected, can you explain to the jury what you mean by that?

A. The car seemed to be completely off balance. I couldn't find — I couldn't find a way to stabilize the vehicle.

Q. What happened after the overcorrection?

A. The vehicle went on two wheels and started to roll towards the passenger's side.

C.A. App. at 1071-72. The testimony of Lisa Samshak Dunlap, the driver of a vehicle behind the Bronco II and an eyewitness to the accident, corroborated Mr. Slonsky's description of how the accident occurred. *Compare* C.A. App. at 1071-72 *with* C.A. App. at 1093-99.

9. Using Ford's Test Data, Dr. Richardson Arrived At The Same Conclusions As The Ford Engineers Who Designed The Bronco II

In addition to Ford's internal memoranda, test data, and the testimony of Ford engineers, Plaintiffs also introduced the testimony of Melvin Richardson, Ph.D. Pet. at 6a. The district court found that Dr. Richardson was qualified to testify as an expert on the subjects of mechanical engineering, machine design, vehicle dynamics and accident reconstruction. *Id.* Dr. Richardson opined that defects in the design of the Bronco II caused the vehicle in this case to roll during Slonsky's lane change. *Id.* at 7a-8a.

Dr. Richardson was a professor of mechanical engineering at Clemson University for twenty years, from 1965 to 1985. Pet. at 6a. During that time, Dr. Richardson taught mechanical engineering, machine design, machine dynamics and stress analysis. *Id.* Dr. Richardson received his Bachelor's Degree from Clemson in mechanical engineering in 1957, his Master's Degree from North Carolina State in mechanical engineering, with an emphasis in machine design, and his Doctorate from the University of Alabama in engineering mechanics in 1965. *Id.* Dr. Richardson also earned a Master's Degree in applied mathematics from the University of Alabama. *Id.* Since 1985, Dr. Richardson has worked full-time as an engineering consultant in the areas of accident reconstruction and machine design, and "[o]n a couple of occasions" has even consulted for Ford Motor Company itself. *Id.* at 6a-7a. Although Dr. Richardson has never published an article on vehicle handling and stability, he has made presentations on those topics in the past. *Id.* at 7a.

At trial, Dr. Richardson testified that dynamics — or the analysis of the forces that produce motion in objects — can be used to analyze vehicular accidents and that accident

reconstruction is simply an application of dynamics to a particular set of facts. Pet. at 7a. To reconstruct vehicular accidents, Dr. Richardson assesses the physical and factual information available to him, applies standard engineering principles to this information and determines the most probable sequence of events. *Id.* at 7a. In the present case, Dr. Richardson reviewed, as did Ford's expert, the police accident report, witness depositions, witness statements, and photographs of the accident scene, and visited the accident site. *Id.* at 8a. Dr. Richardson also reviewed Ford's internal memoranda and extensive design and test data for the Bronco II. *Id.* at 23a, 46a.

Relying on tests performed by Ford's own engineers, Dr. Richardson testified that the Bronco II in this case turned sideways and began to roll because of certain handling and stability defects. *See* Pet. at 7a. First, Dr. Richardson criticized the Bronco II's stability index as too low. *Id.* at 7a, 38a-41a. This conclusion echoed that of Ford engineer Fred Parrill who testified that a vehicle's stability index directly affects a vehicle's performance and its propensity to roll. C.A. App. at 1038-39. Parrill further testified that, in a February 5, 1981 report (relied upon by Dr. Richardson in forming his opinion, *see id.* at 1155-60), the Ford engineers who designed the Bronco II had advocated several feasible alternatives for increasing the Bronco II's stability index. *Id.* at 332, 1039.

Second, Dr. Richardson testified that a rear stabilizer bar on the Bronco II caused "oversteer," which is characterized by a sliding out of the rear of the vehicle in a turn. Pet. at 7a. Again, Dr. Richardson testified that, in forming this conclusion, he had relied in part on a Ford engineering report dated April 28, 1982 that warned that "[a] rear stabilizer is detrimental to handling in a released level configuration . . ." C.A. App. at 1160-65.

Third, Dr. Richardson testified that the design of the Bronco II's twin I-beam suspension caused the vehicle's "jacking." Pet. at 7a. Dr. Richardson explained that, in a hard turn, the Bronco II's suspension will cause the front end of the vehicle to rise and the track width to decrease, making the vehicle taller and narrower and elevating the center of gravity. *Id.* In arriving at his conclusions on the Bronco II's "jacking," Dr. Richardson relied in part on Ford's own internal study titled "Investigation into 'Jacking Effect,' " in which Ford found that the suspension chosen for the production-level Bronco II caused a decrease in the vehicle's track width and an increase in the center of gravity of the vehicle, whereas jacking rarely occurred with the suspensions used by Ford on other vehicles. *See* C.A. App. at 368, 1185-86. Another Ford study relied upon by Dr. Richardson — based on comparison testing between sport utility vehicles — concluded that the production-level Bronco II suffered from jacking measured at ten times that of the Chevrolet S-10 Blazer. *Id.* at 371, 1187-89.

B. The District Court Considered And Rejected Ford's Challenges To The Admissibility Of Dr. Richardson's Testimony.

Ford waited until the week before trial to move for the exclusion of Dr. Richardson's testimony and to request that the district court hold a hearing on the admissibility of that testimony. As the principal basis for its motion, Ford made the curious argument that Dr. Richardson's testimony was unreliable because it was based on Ford's internal documents and test data and had not been independently tested by Dr. Richardson. *See* Pet. at 4a, 30a. Because Ford's motion was predicated on a ruling made nearly three months earlier by another federal district court, and Ford had shown no good cause for its delay in filing until the week before trial, the district court denied Ford's request for a preliminary hearing. *Id.* at 4a.

Having been alerted to Ford's objections, however, the district court stated that it might allow a voir dire of Dr. Richardson before he testified. *Id.* at 4a, 30a.

When Plaintiffs moved to have Dr. Richardson qualified as an expert at trial, the district court offered Ford's counsel an opportunity to conduct a voir dire examination of Dr. Richardson. *See* Pet. at 6a n.4, 31a-34a. Ford's counsel declined the opportunity to conduct voir dire, choosing instead to question Dr. Richardson as to specific topics on cross-examination. *Id.* at 31a. The district court again offered Ford's counsel an opportunity to question Dr. Richardson generally as to his areas of expertise, but Ford's counsel again declined, electing to make foundational objections only. *Id.* at 4a n.4, 32a. The district court then granted Ford a "continuing objection" to Dr. Richardson's ability to express opinions on accident reconstruction. *Id.* at 32a-34a. At the close of Plaintiffs' case, Ford orally moved to strike Dr. Richardson's testimony as unreliable, but the district court denied Ford's motion. *Id.* at 34a.

Finally, after the jury found that the Bronco II's design was defective, Ford argued in its motion for judgment as a matter of law that Dr. Richardson's testimony should have been excluded under *Daubert* because there was a "lack of foundation" for his opinions. C.A. App. at 833; *see* Pet. at 38a. In its opinion denying Ford's motion, the district court noted that, even without considering Dr. Richardson's testimony at all, the jury could have found that the Bronco II was defective based upon Ford's own test data, documents and the testimony of its engineers. Pet. at 38a. Moreover, the district court rejected Ford's attacks on Dr. Richardson's interpretation of, and reliance on, Ford's internal memoranda and tests in reaching his opinions. *Id.* at 46a. Specifically, the district court noted that a "significant portion" of the Ford engineers' " 'extensive

testimony' . . . supported the Plaintiffs' position." *Id.* at 46a. If Ford sought independent testing and verification of Dr. Richardson's theories, its own test data and the conclusions of its engineers provided that verification. *See id.* at 46a. Accordingly, the district court denied Ford's motion for judgment as a matter of law. *Id.* at 46a-47a.

C. The Sixth Circuit Held That The District Court Did Not Abuse Its Discretion In Finding Dr. Richardson's Testimony Reliable

On appeal, Ford once again challenged the admission of Dr. Richardson's testimony, arguing that the district court had abused its discretion in permitting Dr. Richardson to opine in this case. The Sixth Circuit disagreed. Noting the district court's "general gatekeeping obligation" under *Daubert* and *Kumho Tire*, Pet. at 5a, the Sixth Circuit reviewed the record to determine, first, whether the district court had assessed the reliability of Dr. Richardson's testimony and, second, whether the district court abused its discretion in finding the testimony to be reliable. *Id.* at 9a.

After "review[ing] the record in detail," Pet. at 9a, the Sixth Circuit concluded:

> Although the district court did not explicitly recite that Richardson's testimony was relevant and reliable, its rulings indicate that it made that determination. Ford's motion *in limine* squarely raised the issue of reliability. Ford made a variety of objections throughout Richardson's testimony, including a continuing objection to his ability to offer opinion with respect to accident reconstruction, and at the conclusion of the appellees' case, Ford moved to strike Richardson's testimony in its entirety. We

> conclude, based on the district court's rulings on the motions and objections, that the court determined Richardson's testimony was relevant and reliable.

Pet. at 5a. Continuing, the Sixth Circuit examined Dr. Richardson's investigation and his analysis of Ford's internal memoranda and test data, and noted that Ford's engineering experts had employed nearly identical investigations. *Id.* at 5a-8a. The Sixth Circuit noted that Ford had advanced several vague objections to perceived weaknesses in Dr. Richardson's investigation, but failed to show how any of the supposed weaknesses undermined Dr. Richardson's methodology or rendered his testimony unreliable. *Id.* at 8a. Indeed, the Sixth Circuit noted that Ford did not challenge the principle that dynamics can be used to analyze vehicle design and predict their motion. *Id.*

After a meticulous review of the record, the Sixth Circuit concluded that the district court had not abused its discretion in finding that Dr. Richardson's testimony was reliable. Pet. at 8a-9a. Because Dr. Richardson's testimony was properly admitted, the appellate court observed that Ford's criticisms went solely to the weight to be accorded his testimony by the jury. *Id.* at 8a (citing *Daubert*, 509 U.S. at 596 ("Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence.")).

II. REASONS FOR DENYING THE WRIT

Ford's petition should be denied because the rigid and formalistic inquiry espoused by Ford runs counter to this Court's established precedent and eviscerates the discretion critical to a trial court's admissibility determinations. Although Ford purports to advocate the positions of the Seventh, Tenth and Eleventh Circuits, none of those courts have held that a district court must make detailed findings on the record as to the *Daubert* factors, other factors that may be of relevance, and the relative weight to be given to each. Indeed, Ford's proposed standard would mandate the reversal of several of the circuit court decisions Ford professes to support.

Like the Sixth Circuit, the circuit courts cited in Ford's petition do not require a district court's recital of the *Daubert* factors. *See, e.g., Ancho v. Pentek Corp.*, 157 F.3d 512, 518 (7th Cir. 1998). Rather, those courts scrutinize the lower court's record to satisfy themselves that the district court has made an assessment of the expert's reliability and that the assessment was reasonable. That is precisely what the Sixth Circuit did in this case. Because there is no conflict among the circuits for this Court's resolution, and because Ford would have this Court compromise the broad latitude it afforded trial courts just last year in *Kumho Tire*, the petition should be denied.

A. The Sixth Circuit's Decision Is In Accord With *Daubert* And *Kumho Tire* And The Circuit Court Decisions Cited In The Petition

1. The Sixth Circuit's Decision Satisfies *Daubert* And *Kumho Tire*.

In *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 584-93, 594-95 (1993), this Court held that, pursuant to Rule 702 of the Federal Rules of Evidence, a district court must act as a gatekeeper to ensure that expert testimony admitted into evidence is both relevant to the issues in the case and reliable. Declining to enumerate all of the factors that a district court might consider in assessing the reliability of an expert's testimony, this Court stated:

> We are confident that federal judges possess the capacity to undertake this review. Many factors will bear on the inquiry, and we do not presume to set out a definitive checklist or test. . . .

509 U.S. at 592-93. Continuing, the Court explained:

> The inquiry envisioned by [Federal] Rule [of Evidence] 702 is, we emphasize, a flexible one. Its overarching subject is the scientific validity — and thus the evidentiary relevance and reliability — of the principles that underlie a proposed submission. The focus, of course, must be solely on principles and methodology, not on the conclusions that they generate.

Daubert, 509 U.S. at 594-95.

Subsequently, in *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 141 (1999), the Court held that the general gatekeeping obligations set forth in *Daubert* apply to all expert testimony considered by a district court, including testimony based on

technical and other specialized knowledge. The Court also emphasized that the particular factors enumerated in *Daubert* for assessing an expert's testimony — testing, peer review and publication, potential rate of error, and general acceptance of the relevant scientific community — were "made to be helpful, not definitive" and "do not all necessarily apply even in every instance in which the reliability of scientific testimony is challenged." *Kumho Tire,* 526 U.S. at 151. Indeed, the Court stated that "the trial judge must have considerable leeway in deciding in a particular case how to go about determining whether particular expert testimony is reliable. That is to say, a trial court should consider the specific factors identified in *Daubert* where they are reasonable measures of the reliability of expert testimony. . . ." *Kumho Tire*, 526 U.S. at 152. Accordingly, the Court held that an abuse-of-discretion standard "applies as much to the trial court's decisions about how to determine reliability as to its ultimate conclusion. Otherwise, the trial judge would lack the discretionary authority needed. . . ." *Id*; *see id.* at 153 ("[W]hether *Daubert's* specific factors are, or are not, reasonable measures of reliability in a particular case is a matter that the law grants the trial judge broad latitude to determine.").

In this case, the Sixth Circuit heeded the Court's dictates in *Daubert* and *Kumho Tire* and accorded the district court the appropriate deference to assess the relevance and reliability of Dr. Richardson's testimony. Noting that a formal hearing is not required by *Daubert*, and that Ford had declined its opportunities to voir dire Dr. Richardson and to question him at the outset of his testimony, the Sixth Circuit examined the district court's rulings on the issue of reliability throughout the trial and in its written opinions. Pet. at 4a-9a. Observing that the district court had ruled upon the reliability issue each time it was raised by Ford and that the court was careful to preserve each of Ford's objections for appellate review, the Sixth Circuit

concluded that the district court had indeed considered the reliability of Dr. Richardson's testimony.[13] *Id.* at 5a. Moreover, after reviewing the record itself, and the similarities in investigation and methodology employed by Ford's own experts, the Sixth Circuit held that the district court had not abused its discretion in finding Dr. Richardson's testimony reliable. *Id.* at 34a.

The district court fulfilled its gatekeeping obligations in accordance with *Daubert* and *Kumho Tire*, and the Sixth Circuit correctly affirmed. The petition should be denied.

2. The Sixth Circuit's Decision Does Not Conflict With The Circuit Court Decisions Cited By Ford.

Contrary to Ford's assertion, the Sixth Circuit's decision does not conflict with the circuit court cases cited by Ford in its petition. Accordingly, there is no significant question for this Court's resolution.

As a threshold matter, the circuit courts uniformly agree that a district court has an obligation as "gatekeeper" to assess the relevance and reliability of an expert's testimony. *See* Pet. at 4a-5a; *Goebel v. Denver and Rio Grande Western R.R. Co.*, 215 F.3d 1083, 1087 (10th Cir. 2000); *United States v. Velarde*, 214 F.3d 1204, 1208 (10th Cir. 2000); *United States v. Lee*, 25 F.3d 997, 998 (11th Cir. 1994); *Ancho v. Pentek Corp.*,

13. If, as Ford suggests, the district court had actually rejected the application of *Daubert* to Dr. Richardson's testimony, then surely it would not have permitted Ford repeated opportunities to voir dire Dr. Richardson, to question him generally as to his areas of expertise, to maintain a continuing objection to his testimony under *Daubert*, or to establish its record for purposes of appeal. If the district court believed that *Daubert* were inapplicable, it simply would have denied Ford's motion *in limine* at the outset and then refused Ford additional opportunities to contest the admissibility of the testimony under *Daubert*.

157 F.3d 512, 515 (7th Cir. 1998). The circuits also agree that a district court need not hold a formal hearing to fulfill this obligation and can, instead, perform this role "when asked to rule on a motion *in limine*, on an objection during trial, or on a post-trial motion. . . ." *Goebel*, 215 F.3d at 1087 (citing *Daubert*, 509 U.S. at 597); *see also* Pet. at 5a. Further, the circuit courts agree that, in order to survive appellate scrutiny, a district court must ensure that there is a "sufficiently developed record" to demonstrate that it performed its gatekeeping function and concluded that the expert's "testimony both rests on a reliable foundation and is relevant to the task at hand . . ." *Goebel*, 215 F.3d at 1087, 1088 (citations and quotations omitted); *see also* Pet. at 5a (noting that, in the absence of a *Daubert* hearing, an appellate court " 'must review the record to determine whether the district court erred in its assessment of the relevance and reliability of the expert testimony' ") (quoting *Greenwell v. Boatwright*, 184 F.3d 492, 498 (6th Cir. 1999)).

As for the extent to which a district court must detail its gatekeeping analysis for an appellate court's review, there is no circuit split for this Court's resolution because only the Tenth Circuit has expressed an opinion on the issue and, even then, the reach of its holding is uncertain. For example, the Tenth Circuit has stated that a district court "must adequately demonstrate by specific findings on the record that it has performed its duty as gatekeeper." *Goebel*, 215 F.3d at 1088. Whether this statement requires the district court to make explicit findings as to each of the four *Daubert* factors, other factors that may be of relevance, or the relative weight to be given to each — as Ford urges, *see* Pet. at 20 — has not yet been considered by the Tenth Circuit. *See Goebel*, 215 F.3d at 1088; *see also United States v. Velarde*, 214 F.3d 1204, 1210 (10th Cir. 2000) ("We did not specify that any particular type of reliability determination must be made. However, some such

reliability determination must be apparent from the record. The trial court's 'evidentiary decisions do not warrant reversal if it determined, ***in some apparent manner***, that the expert testimony admitted was reliable.' ") (emphasis added) (citation omitted).[14]

Although the *Goebel* court stated that a district court must make findings on the record to indicate "that it has performed its duty as gatekeeper," it explained that the district court "need not 'recite the *Daubert* standard . . .' or apply all of the

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14. Unlike in *Goebel*, the reliability determination here is apparent from the record. The district court not only ruled on all *Daubert* objections and motions characterizing the expert testimony as "junk science," it had the results of the underlying tests and data from Ford's own engineers upon which Dr. Richardson relied. *See, e.g.*, C.A. App. at 350-56, 1658-60; Pet. at 38a-41a, 46a-47a. There was no such evidence in *Goebel*. Further, as the Sixth Circuit noted, and again as distinguishable from *Goebel*, Ford did not challenge Dr. Richardson's fundamental principle that dynamics can be used to analyze vehicle designs and predict their motion. Pet. at 8a.

In further contrast with the present case, the district court in *Goebel* apparently gave no indication that it ever performed a *Daubert* analysis or that it actually considered objections raised to the expert testimony. Rather than presenting the objecting party with a forum and full opportunity to challenge the relevance and reliability of the expert's testimony at the outset, and then to articulate and have addressed specific objections to each discrete subject on which the expert opined, the district court simply denied without comment the objecting party's motion *in limine* and made the vague assurance that all relevant objections had been "fully considered." *Goebel*, 215 F.3d at 1088. On appeal, the Tenth Circuit stated that it could not determine "whether the district court was referring to the professional credentials of the witness . . . [or] the reasoning and methodology relied upon by the witness" when the district court stated that it had "fully considered the matter." *Id.* at 1088. On the basis of such a sparse record, the Tenth Circuit held that it could not determine whether the district court had indeed considered the reliability of the testimony and, thus, remanded the case to the district court for a new trial. *Id.* at 1089.

reliability factors suggested in *Daubert* and *Kumho*." *Goebel*, 215 F.3d at 1088 (quoting *Ancho*, 157 F.3d at 518). Emphasizing that the gatekeeper inquiry must remain "flexible," the Tenth Circuit concluded that, so long as the district court "adequately demonstrate[s]" that it has performed its function as gatekeeper, the district court's decision should be affirmed. *Goebel*, 215 F.3d at 1088. Considering the Tenth Circuit's reliance on *Ancho*, discussed *infra*, the Tenth Circuit could not have intended to require the sort of extensive findings and explanatory narrative advocated by Ford. *See Goebel*, 215 F.3d at 1088 (citing *Ancho*, 157 F.3d at 516-18).

Moreover, none of the other circuit courts — including the Sixth Circuit — has stated the extent to which the district court must document its gatekeeping analysis in order to survive appellate review. In fact, in *Ancho*, the Seventh Circuit affirmed the district court's admissibility determination even though the district judge "did not specifically mention the four [*Daubert*] guideposts used to assess the reliability and validity of an expert's methodology." 157 F.3d at 517. Although the Seventh Circuit stated that it would have been "helpful" if the trial judge had articulated in detail his application of *Daubert*, it nevertheless concluded that "when the trial judge's decision is read in totality, . . . it [is] sufficiently clear that he very definitely relied on the *Daubert* standard when rendering his oral ruling." *Id.* at 517-18. Similarly, the Eleventh Circuit has established no rule requiring the district court to make detailed findings as to its application of *Daubert* and, instead, simply "encourage[s]" that findings be made to facilitate appellate review. *See United States v. Lee*, 25 F.3d 997, 999 (11th Cir. 1994).

The Sixth Circuit's decision in the present case similarly expresses no opinion as to the extent to which a district court must document its *Daubert* analysis on the record. Just as the other circuits do, however, the Sixth Circuit reviews the record

in its totality to ensure that the district court performed its gatekeeping function and that its assessment of reliability was reasonable. In the present case, rather than simply "infer[ring]" that the district court had faithfully performed its gatekeeping function — as Ford accuses, *see* Pet. at 11, 15 — the Sixth Circuit scrutinized the district court record to ensure that an assessment of reliability was made and that the assessment was reasonable. *Id.* at 5a. Moreover, the Sixth Circuit noted that the district court offered Ford's counsel the opportunity to conduct voir dire of Dr. Richardson at the outset of his testimony and then to question Dr. Richardson generally as to his areas of expertise. *Id.* at 6a n.4 Ford's counsel, however, declined both opportunities, choosing instead to make foundational objections and to challenge the reliability of Dr. Richardson's testimony on cross-examination. *Id.*

After examining the district court's rulings on the specific motions and objections made to the expert's testimony, the Sixth Circuit concluded that the district court had considered Ford's objections, ruled on the record as to each of the discrete objections made, and properly found that "Richardson's testimony was relevant and reliable." Pet. at 5a. As in *Ancho*, the Sixth Circuit reviewed the record in its totality and found to its satisfaction that the district court understood its obligation under *Daubert* to assess the reliability of Dr. Richardson's testimony and that the district court did, in fact, do so. *Id.* at 5a. Because the Sixth Circuit's decision does not conflict with the decisions of the other circuit courts identified in Ford's petition, there is no circuit split for this Court's resolution. The petition should be denied.

3. Ford's Proposed Requirement That All District Courts Recite Specific Findings On The Record Reflecting The Extent Of Their *Daubert* Analyses And Detailing Their Reliability Determinations Is Contrary To The Flexible Inquiry Established By This Court In *Daubert* And *Kumho Tire.*

Contrary to the "flexible" inquiry envisioned by this Court in *Daubert* and *Kumho Tire*, Ford appears to argue in its petition that a district court should be required:

> to make factual findings concerning how the expert actually conducted the underlying evaluation, what sources of data were relied upon, . . . what reasoning was used in forming conclusions . . . which of the *Daubert* reliability factors are pertinent, what other indicia of reliability or unreliability are present, whether the pertinent *Daubert* or other factors are satisfied, and how much weight should be given to each factor.

Pet. at 20.

In essence, Ford urges this Court to adopt the type of "definitive checklist or test" that this Court rejected first in *Daubert* and again in *Kumho Tire*. *See Daubert*, 509 U.S. at 593, 594-95 ("We are confident that federal judges possess the capacity to undertake this review. Many factors will bear on the inquiry, and we do not presume to set out a definitive checklist or test. . . . The inquiry envisioned by [Federal] Rule [of Evidence] 702 is, we emphasize, a flexible one."); *Kumho Tire*, 526 U.S. at 152 ("The trial court must have the same kind of latitude in deciding how to test an expert's reliability . . . as it enjoys when it decides whether or not that expert's relevant testimony is reliable"). Similarly, Ford's

suggested checklist runs counter to the circuit decisions cited in Ford's petition. *See Ancho*, 157 F.3d at 518 ("Trial judges need only follow (i.e. adhere to) *Daubert* when making a Fed. R. Evid. 702 determination, [citation omitted]; they are not required to recite the *Daubert* standard as though it were some magical incantation."); *Velarde*, 214 F.3d at 1208-09 ("The trial judge enjoys equally broad discretion in both deciding how to assess an expert's reliability, including what procedures to utilize in making that assessment, as well as in making the ultimate determination of reliability.") (citations omitted).

Requiring a district court to conduct a formalistic and mechanical analysis of each of the *Daubert* factors — even if only to state the irrelevance of a factor to the analysis — threatens to compel numerous reversals for purely technical "errors" in following Ford's checklist, to spawn unnecessary reliability determinations within the context of any trial and to lengthen the proceedings in the district courts. *See Kumho Tire*, 526 U.S. at 152 (trial judge must have discretionary authority "to avoid unnecessary 'reliability' proceedings. . . . Indeed, the Rules seek to avoid 'unjustifiable expense and delay' as part of their search for 'truth' and the 'jus[t] determin[ation]' of proceedings.") (quoting Fed. R. Evid. 102). Indeed, Ford's suggested checklist analysis would mandate the reversal of several of the authorities cited approvingly by Ford in its petition. *See, e.g.*, *Ancho*, 157 F.3d at 518 (affirming district court's admissibility determination even though the district court made no mention of the specific *Daubert* factors) ("[W]hen the trial judge's decision is read in totality, we deem it to be sufficiently clear that [the district court] very definitely relied on the *Daubert* standard when rendering his oral ruling. Furthermore, we all understand that oral rulings are not as formalistic, definitive, and specific as written ones."). Because Ford's proposed standard is contrary to the flexible inquiry espoused by this Court and the circuit courts, the petition should be denied.

B. The Sixth Circuit Did Not Yield A Judicial Determination To The Jury; It Followed *Kumho Tire* In According The Trial Court Discretion To Determine Whether A Particular *Daubert* Factor Was A Reasonable Measure Of Reliability.

Ford's second purported reason for this Court's review is no more compelling than the first. While Ford remains impaled on the absence of independent vehicle testing by Dr. Richardson, it ignores, or simply fails to acknowledge that: (1) under *Kumho Tire*, a district court possesses discretion to determine *which* of the *Daubert* factors are appropriate measures of reliability; (2) the record is replete with Ford's own testing upon which Dr. Richardson relied; and (3) Ford faults Dr. Richardson for failing to conduct his own vehicle tests after Ford ceased its own testing in 1982 out of concern for the safety of Ford's test drivers. *See Kumho Tire*, 526 U.S. at 153; C.A. App. at 350-56, 368, 1049-50, 1155-65, 1185-89, 1658-60; Pet. at 38a-41a, 46a-47a.

Consistent with *Kumho Tire*, the Sixth Circuit noted that a district court possesses discretion to determine *which* of the *Daubert* factors are appropriate measures of the reliability — and, thus, the admissibility — of an expert's testimony in a given case. Pet. at 5a; *Kumho Tire*, 526 U.S. at 153 ("Thus, whether *Daubert*'s specific factors are, or are not, reasonable measures of reliability in a particular case is a matter that the law grants the trial judge broad latitude to determine."). Here, Ford's entire argument rests on the assumption that Dr. Richardson's alleged failure to test his theories [15] *was* critical

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15. The fact that Dr. Richardson relied on tests performed by Ford's own engineers, rather than recreating those tests himself, does not mean that Dr. Richardson's theories have never been tested. Ford ought not be heard to challenge the reliability and validity of its own internal testing records or the conclusions that can be drawn therefrom.

to the admissibility determination in this case. Neither the district court, nor the Sixth Circuit, so held. In fact, the district court dismissed Ford's attack on Dr. Richardson's failure to conduct independent testing because Dr. Richardson relied principally on Ford's own test data and internal documents in formulating his conclusions, and because the conclusions he drew from those documents were supported by the " 'extensive testimony' of Ford's own engineers. . . ." Pet. at 46a.

Only Ford's tortured reading of the Sixth Circuit's opinion, then, could produce its second question presented. The Sixth Circuit did not endorse yielding a judicial determination to the jury. Rather, it recognized that on *this* record, in *this* case, with testing by Ford's own engineers, reliability could be assessed without Dr. Richardson's recreation of Ford's tests. Thus, the Sixth Circuit noted that the district court in this case possessed the discretion to determine whether Dr. Richardson's alleged failure to conduct his own tests was relevant to the admissibility (i.e., reliability) of that testimony, or simply to the weight to be accorded the testimony by the jury. Pet. at 8a.

As with Ford's effort to conjure a conflict with reference to a limited and distinguishable case, its determination to separate itself from the tests of its own engineers and its misinterpretation of the Sixth Circuit's application of *Kumho Tire* fail to raise a significant issue for this Court's review.

III. CONCLUSION

For all of the foregoing reasons, the petition should be denied.

Respectfully submitted,

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MOTION FILED

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No. 00-497

IN THE

Supreme Court of the United States

FORD MOTOR COMPANY,

Petitioner,

v.

DOLORES CLAY, as Administratrix of the Estate of KATHLEEN P. CLAY, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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Date: November 1, 2000

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for the Sixth Circuit

MOTION FOR LEAVE TO FILE BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

Pursuant to Rule 37.2 of the Rules of this Court, the Washington Legal Foundation (WLF) respectfully moves for leave to file the attached brief as *amicus curiae* in support of Petitioner. Petitioner has consented to the filing of this brief; its letter of consent has been lodged with the Clerk of the Court. Counsel for Respondents have declined to consent, thereby necessitating the filing of this motion.

WLF is a non-profit public interest law and policy center with supporters in all 50 states, including many in

Ohio. WLF regularly appears before federal and state courts promoting economic liberty, free enterprise, and a limited and accountable government.

In particular, WLF has devoted substantial resources over the years through litigation and publishing to promote civil justice reform, including tort reform. WLF appeared as *amicus curiae* in three recent cases in which the Court addressed the gatekeeping function of federal judges with respect to the admission of expert testimony. *See Kumho Tire Co. v. Carmichael,* 526 U.S. 137 (1999); *General Electric Co. v. Joiner,* 522 U.S. 136 (1997); *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).

WLF recognizes that federal district judges must be afforded broad discretion with respect to the precise method by which they perform their expert-witness "gatekeeping" function. Such decisions should not be reversed on appeal in the absence of an abuse of that discretion. Nonetheless, the discretion afforded district judges does not include the discretion to perform their gatekeeping function inadequately or not at all. WLF believes that it is incumbent on the appellate courts to ensure that district courts are doing an adequate job of excluding unreliable and irrelevant expert testimony from trial. WLF is concerned that the decision below, if allowed to stand, will deprive appellate courts of the tools necessary to perform their oversight function.

WLF has no direct interest, financial or otherwise, in the outcome of this case. Accordingly, WLF believes that it can bring a perspective on the issues presented that is distinct from that of any of the parties.

For the foregoing reasons, the Washington Legal Foundation respectfully requests that it be allowed to participate in this case by filing the attached brief.

Respectfully submitted,

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Date: November 1, 2000

QUESTION PRESENTED

Amicus curiae will address the following question only:

Whether a trial court presented with a motion to exclude expert testimony as unreliable under Federal Rule of Evidence 702 and *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), is required to provide a reasoned explanation on the record concerning its decision to admit or exclude the testimony.

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BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

INTERESTS OF *AMICUS CURIAE*

The interests of *amicus curiae* Washington Legal Foundation (WLF) are set forth in the motion accompanying this brief.[1]

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[1] Pursuant to Supreme Court Rule 37.6, WLF states that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than WLF and its counsel, contributed monetarily to the preparation and submission of this brief.

STATEMENT OF THE CASE

In the interests of brevity, WLF hereby incorporates by reference the Statement contained in the Petition for a Writ of Certiorari.

This case arises from a 1988 traffic accident in which a Bronco II manufactured by Petitioner Ford Motor Co. ("Ford") rolled over several times. Two unbelted occupants were ejected from the vehicle and died from their injuries. The estates of the two decedents filed this tort action against Ford, claiming that the Bronco II was defectively designed and that the alleged defect was the proximate cause of the deaths. Petition Appendix ("Pet. App.") 2a-3a.

Respondents' principal expert witness on design defect issues was Melvin Richardson. Richardson testified that the Bronco II was defectively designed in three respects: (1) its "stability index" (which purportedly measures a vehicle's ability to resist rolling over) was too low; (2) a rear stabilizing bar on the Bronco II causes the vehicle to oversteer, which is characterized by spinning out on a turn; and (3) the front suspension on the Bronco II causes "jacking" (that is, the front of the vehicle will rise during a hard turn). Pet. App. 7a. Richardson further testified that the three alleged defects he identified were the sole causes of the roll over that occurred in this case. *Id.* at 8a.

One week before trial, Ford filed a motion in limine to exclude or limit Richardson's testimony on the ground that it was unreliable. *Id.* at 4a. The trial judge denied a hearing on the motion, holding that the motion was untimely. *Id.* When, at trial in May 1998, Respondents sought to qualify Richardson as an expert witness on design

defect issues, the trial judge permitted Ford to interpose a "continuing objection" to the admission of any of Richardson's expert testimony, and then permitted the expert testimony to proceed. *Id.* at 32a-33a. At the conclusion of Respondent's case, the trial judge without explanation denied Ford's motion to strike all of Mr. Richardson's testimony "under the grounds of *Daubert*." *Id.* at 34a. At the close of all the evidence, the trial judge again denied without explanation Ford's motion to exclude the expert testimony. *Id.*

After trial, the jury returned a verdict against Ford and awarded Respondents $17.5 million in compensatory damages (later reduced to $10.5 million). Ford then moved for judgment notwithstanding the verdict or, alternatively, for a new trial on several grounds, including that Richardson's expert testimony was inadmissible. The trial court denied the motion, stating that there was sufficient evidence aside from Richardson's testimony upon which the jury might have concluded that a defect in the Bronco II proximately caused Respondents' damages. *Id.* at 35a-48a. The trial judge's order denying the motion did not address the reliability of Richardson's testimony.[2]

Ford's appeal from the district court judgement relied principally on its claim that Richardson's expert testimony should not have been admitted into evidence. A divided

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[2] The order nonetheless implicitly affirmed the trial judge's prior rulings that the expert testimony was properly admitted into evidence. Ford indisputably would have been entitled to a new trial if it were determined that Respondents' principal evidence regarding design defect had improperly been admitted into evidence.

panel of the U.S. Court of Appeals for the Sixth Circuit affirmed. *Id.* at 1a-25a.

The majority admitted that this was a "close case," but it affirmed on the ground that it was "not firmly convinced that the [district] court abused its discretion by allowing Richardson to testify." *Id.* at 4a. The appeals court acknowledged the factual accuracy of Ford's criticism of Richardson's methodology. *Id.* at 8a.[3] The appeals court also acknowledged that the trial judge never explicitly indicated that he had examined the reliability of Richardson's methodology and conclusions, and never stated that he was admitting Richardson's testimony because he had concluded that the testimony was reliable. *Id.* at 5a. The appeals court nonetheless ruled that the trial judge must have arrived at that conclusion because he would not otherwise have denied the motion to exclude the testimony. *Id.*[4]

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[3] In particular, the appeals court stated (as noted by Ford) that Richardson's "investigation consisted only of reviewing the police accident report and 'some' depositions, statements, and photographs and of visiting the accident site the day before he testified." *Id.* The court also noted his "failure to test his theories that the Bronco II oversteers and 'jacks.'" *Id.*

[4] The appeals court's precise rationale was as follows:

> Although the district court did not explicitly recite that Richardson's testimony was relevant and reliable, its rulings indicate that it made that determination. Ford's motion in limine squarely raised the issue of reliability. Ford made a variety of objections throughout Richardson's testimony, including a continuing objection to his ability to offer opinions with respect to accident reconstruction, and at the conclusion of the appellees' case, Ford moved to strike Richardson's testimony in its entirety. We conclude, based on the district court's rulings on the motions and

(continued...)

The appeals court then examined the evidence bearing on the trial court's "finding" that Richardson's testimony was reliable, "focus[ing] on the methodology and principles used by Richardson, not on his conclusions." *Id.* at 6a. Based on that examination, the appeals court ruled that the district judge had not abused his discretion in determining that Richardson's expert testimony was sufficiently reliable to be admitted under F.R.E. 702. *Id.* at 6a-9a. With respect to Mr. Richardson's admitted failure to test his theories that the Bronco II oversteers and "jacks," the appeals court opined: "The district court, in its discretion, could have decided that Richardson's failure to test his theories went to the weight of his testimony regarding defects in the Bronco II, not to its admissibility." *Id.* at 8a.

Judge Ryan dissented. *Id.* at 18a-25a. He stated that the district court's decision to admit Richardson's expert

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[4](...continued)
objections, that the court determined Richardson's testimony was relevant and reliable.

Id.

The trial court issued its rulings in 1998, a year before this Court issued its decision in *Kumho Tire*. That decision resolved a split among the circuit courts by determining that the "gatekeeping" function imposed on trial courts by F.R.E. 702 (and described in detail in *Daubert*) applied not only to scientific expert testimony but to other types of expert testimony as well. *Kumho Tire*, 526 U.S. at 141. Nonetheless, the appeals court's decision does not consider the possibility that the trial judge admitted Mr. Robertson's testimony not because he believed that the testimony could survive a *Daubert* "gatekeeping" analysis but because he believed (as did many federal courts prior to *Kumho Tire*) that the "gatekeeping" analysis is not required when (as here) the expert testimony does not qualify as "scientific" expert testimony.

testimony was reversible error, because the district court "made no express assessment at any time as to the reliability of Dr. Richardson's testimony." *Id.* at 20a. Judge Ryan also determined that it would have been an abuse of discretion for the district court to have found that Richardson's testimony was reliable. He concluded:

> The record is absolutely devoid of any indication that the process or methodology Dr. Richardson employed in reaching his accident reconstruction opinion was "good science" or "good engineering." . . . The record is also devoid of any evidence showing that Dr. Richardson employed recognized, reliable scientific or engineering methodology in reaching his conclusion that the Bronco II has handling and stability design defects.

Id. at 21a-22a.

The Sixth Circuit denied rehearing on August 15, 2000. *Id.* at 86a-87a. Ford filed its petition for a writ of certiorari on October 2, 2000.

REASONS FOR GRANTING THE PETITION

WLF fully supports the arguments put forth by Ford regarding why grant of the Petition is warranted. The Sixth Circuit concluded that the "gatekeeping" functions imposed by F.R.E. 702 do not require a district court to present a reasoned explanation concerning its decision to admit or exclude expert testimony; that conclusion squarely conflicts with a decision from the Tenth Circuit. Moreover, the decision below is inconsistent with this Court's decision in *Kumho Tire*. The Sixth Circuit held that a district court does not abuse its discretion by admitting the testimony of

a proposed expert who fails to test his theories despite the feasibility of doing so; *Kumho Tire* indicates that an expert's failure to test his theories renders his testimony unreliable, and therefore inadmissible under F.R.E. 702, where (as here) the presence or absence of testing is a "reasonable measure[] of the reliability of [the] expert testimony." *Kumho Tire*, 526 U.S. at 152; *see id.* at 158-59 (Scalia, J., concurring) (district courts not afforded "discretion to abandon the gatekeeping function").

WLF writes separately in order to emphasize the significant public importance of the issues raised by this case. Use of expert testimony is becoming increasingly frequent in federal court trials. In many complex cases, the decision whether to admit proffered expert testimony is outcome-determinative, in the sense that the party bearing the burden of persuasion will not be permitted to put his case before a jury if the testimony is excluded. Expert testimony frequently weighs heavily on a jury's deliberation, in light of the layperson's natural tendency to accept uncritically the conclusions of well-credentialed witnesses. Accordingly, as the Court made resoundingly clear in *Daubert* and *Kumho Tire*, district judges must take seriously their role as gatekeepers and exclude from trial any expert testimony not shown to be both relevant and reliable.

Just as trial judges are charged with the responsibility of acting as gatekeepers to exclude unreliable expert testimony, *appellate* judges are charged with the responsibility of ensuring that trial judges are not abusing their discretion in performing their gatekeeping function. This case raises issues of tremendous practical importance regarding that appellate function. If, as the Sixth Circuit held, trial judges are under no obligation to provide reasoned explanations for

their decisions to admit or exclude expert testimony, then appellate review will be quite limited. Because it often will be impossible to ascertain the actual basis for the trial court's ruling, decisions to admit or deny expert testimony will be upheld so long as the trial court *could have* articulated *some* basis that would not have constituted an abuse of discretion. If, on the other hand, the Tenth Circuit's decision in *Goebel v. Denver and Rio Grande Western Ry. Co.*, 215 F.3d 1083 (10th Cir. 2000), is correct and trial courts *are* required to make specific findings regarding the bases for such decisions, then more meaningful appellate review will be possible.

WLF respectfully suggests that the Tenth Circuit has the better argument. In light of the developing case law in this area as well as changes in the underlying rules of evidence,[5] it is inevitable that trial courts will make errors of law when performing their Rule 702 gatekeeping function. Such errors of law constitute "abuse of discretion" and thus are subject to reversal on appeal. Yet, if trial courts are not required to state the bases for their rulings, appellate courts will not discover those errors of law and will have no opportunity to correct them.

Moreover, as the Court has recognized, the Rule 702 gatekeeping function imposes a substantial burden on district judges. *Daubert*, 509 U.S. at 592-95; *Joiner*, 522 U.S. at 147-48 (Breyer, J., concurring) ("This requirement will sometimes ask judges to make subtle and sophisticated

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[5] An amendment to Rule 702 of the Federal Rules of Evidence was adopted by the Court on April 17, 2000 and is scheduled to take effect on December 1, 2000. Nothing in the amendment bears directly on the issues raised by the Petition.

determinations about scientific methodology and its relation to the conclusions an expert witness seeks to offer. . . Of course, neither the difficulty of the task nor any comparative lack of expertise can excuse the judge from exercising the "gatekeeper" duties that the Federal Rules impose."). Given that burden, some district courts may be tempted to abdicate their gatekeeping function altogether -- by admitting expert evidence of questionable reliability on the theory that the jury is equipped to evaluate reliability on its own. There is evidence that numerous trial courts gave in to that temptation prior to *Daubert*, and that the practice may continue even today. Establishing a "reasoned explanation" requirement would significantly reduce the likelihood that a trial judge will admit expert testimony solely to avoid the gatekeeping burdens imposed by Rule 702.

In light of the significant impact that the issues raised by this case will have on the admissibility of expert testimony, WLF respectfully submits that the Petition should be granted.

I. REVIEW IS WARRANTED BECAUSE THE QUESTION PRESENTED IS OF MAJOR IMPORTANCE IN THE LARGE NUMBER OF EXPERT TESTIMONY MOTIONS ADDRESSING UNRESOLVED ISSUES OF LAW

Rule 702 permits "a witness qualified as an expert by knowledge, skill, experience, training, or education" to provide expert testimony "[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue." The Supreme Court has made clear that Rule 702 imposes on trial judges a substantial "gatekeeping" function; they are

to exclude proffered expert testimony unless it meets Rule 702's exacting standards. *Daubert*, 509 U.S. at 589 ("under the Rules the trial judge *must insure* that any and all scientific testimony or evidence admitted is not only relevant, *but reliable*") (emphasis added). *Kumho Tire* held that the same exacting standards apply to *all* expert testimony, regardless whether the testimony is deemed "scientific" in nature (as in *Daubert*) or whether the testimony relates to "technical or other specialized knowledge." *Kumho Tire*, 526 U.S. at 151.

"Abuse of discretion" is the proper standard of review in an appeal from a trial judge's decision to admit or deny expert testimony pursuant to Rule 702. *Joiner*, 522 U.S. at 143. Under that standard, findings by a district judge regarding whether the proffered expert testimony meets the exacting legal standards established by Rule 702 are generally entitled to substantial deference. *Id.* That same deference does not apply to a trial judge's interpretation of Rule 702's legal requirements. Rather, even under an "abuse of discretion" standard, issues of law are subject to de novo review. *Koon v. United States*, 518 U.S. 81, 100 (1996) ("A district court by definition abuses its discretion when it makes an error of law."). Every federal appeals court that has addressed the issue in the context of alleged errors of law under Rule 702 has held that a district court abuses its discretion when it admits or excludes expert testimony based on an error of law. *See, e.g., Westberry v. Gislaved Gummi AB*, 178 F.3d 257, 261 (4th Cir. 1999); *Heller v. Shaw Industries, Inc.*, 167 F.3d 146, 151 (3d Cir. 1999); *Kennedy v. Collagen Corp.*, 161 F.3d 1226, 1227 (9th Cir. 1998), *cert. denied*, 119 S. Ct. 1577 (1999).

When a trial judge fails to explain her reasons for admitting or excluding expert testimony, appellate courts cannot determine whether the trial judge has issued her ruling based on a misunderstanding of Rule 702's legal requirements. Under those circumstances, rulings admitting or excluding expert testimony based on errors of law will never be corrected.

The possibility of such unreviewable errors would be of lesser importance if Rule 702's legal requirements were relatively clear and thus federal judges could be expected to apply the correct legal standards in the great majority of cases. However, the situation now facing the federal courts is quite the opposite: there are numerous unresolved issues of law surrounding Rule 702 that have led to conflicting lower-court decisions, and thus virtually any trial court decision to admit or deny expert testimony runs a very real risk of being based on legal error.

This brief describes several of the unresolved issues of law surrounding Rule 702. The existence of these unresolved legal issues serves to highlight the importance of this case; only by granting review and adopting the Tenth Circuit's rationale in *Goebel* (and thereby rejecting the decision below that trial courts need not provide a reasoned explanation of their Rule 702 rulings) can the Court ensure effective review of decisions addressing those unresolved issues.

Differential Diagnosis. One issue that has created considerable conflict, both within the federal courts and among academics, is the admissibility of expert medical testimony offering opinions based on a diagnostic technique known as "differential diagnosis." Differential diagnosis is

commonly used by doctors in an effort to determine what injury/disease is giving rise to a patient's symptoms, and/or to determine what was the cause of the patient's injury/disease. After compiling a list of all possible causes of the injury/disease, doctors conduct tests in an effort to eliminate sufficient numbers of the possible causes to allow them to identify the actual cause with some degree of accuracy. *See, generally, Westberry,* 178 F.3d at 263-64.

There has been considerable disagreement among the federal appellate courts regarding the conditions under which medical opinions based on differential diagnostic should be deemed reliable and thus admissible under Rule 702. In particular, there has been considerable disagreement regarding the significance of temporal proximity (e.g., if a disease first arose immediately after the plaintiff's exposure to a chemical, can any conclusions be drawn regarding whether the exposure caused the disease?).

A considerable body of thought holds that temporal proximity should play little or no role in differential diagnoses. *See, e.g., Moore v. Ashland Chemical, Inc.,* 151 F.3d 269, 278 (5th Cir. 1998) (*en banc*) (temporal proximity, standing alone, is entitled to little weight in determining causation), *cert. denied,* 119 S. Ct. 1454 (1999); *Rosen v. Ciba-Geigy Corp.,* 78 F.3d 316, 318 (7th Cir. 1996) (temporal relationship is a "perilous basis" for causal inference), *cert. denied,* 519 U.S. 819 (1996); Mark R. Hall, *Applying Daubert to Medical Causation Testimony by Clinical Physicians,* 27 PRODUCT SAFETY & LIABILITY No. 45 (Nov. 12, 1999); Daniel J. Capra, *The Daubert Puzzle,* 32 Ga. L. Rev. 699, 723-24 (1998) (an expert's primary reliance on temporal proximity to demonstrate

causation is a "red flag" suggesting that the proffered testimony is unreliable).[6]

Other authorities have been far more receptive to differential diagnoses based on temporal proximity and have been highly critical of decisions, such as *Moore,* that dismissed that approach as unreliable. *See, e.g.,* Note, *Navigating Uncertainty: Gatekeeping in the Absence of Hard Science,* 113 Harv. L. Rev. 1467, 1482-83 (2000); *Westberry,* 178 F.3d at 265 (disagreeing with *Moore,* Fourth Circuit states, "depending on the circumstances, a temporal relationship between exposure to a substance and the onset of a disease or a worsening of symptoms can provide compelling evidence of causation").

Given the roughly even split among federal courts on the propriety of experts' reliance on temporal proximity to demonstrate causation, it stands to reason that a sizeable number of federal court decision addressing the issue are based on errors of law. Yet, many of those errors will go unreviewed on appeal for so long as trial courts making those decisions are not required to provide a reasoned explanation.

Expert Testimony Based Solely on Experience. One need not possess specialized scientific or technical training in order to qualify as an expert witness under Rule 702. So long as one has, through experience, gained knowledge not widely shared, one may be permitted to testify as an expert witness regarding that knowledge. Thus, for example, a

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[6] Prof. Capra serves on the Judicial Conference Advisory Committee on the Federal Rules of Evidence. The Committee's proposed revisions to Rule 702 were recently adopted by the Court.

police officer familiar with illegal drug transactions may be permitted to testify as to the meaning of code words used to conceal the nature of those transactions. *See* Committee Notes to April 2000 amendments to Federal Rules of Evidence at 25. But according to those Notes, an expert seeking to testify based solely on experience cannot establish the reliability of his testimony based solely on his own say-so: "The trial court's gatekeeping function requires more than simply 'taking the expert's word for it.'" *Id.* at 26.[7]

The obvious follow-up question is, "How much more?" This Court has never articulated a standard, and the answers provided by the lower courts are far from uniform. *Compare, O'Connor v. Commonwealth Edison Co.*, 13 F.3d 1090 (7th Cir. 1994) (experience-based expert testimony by treating physician properly excluded where physician could not demonstrate the objectivity of his methodology); *Maynard v. Ferno-Washington, Inc.*, 22 F. Supp.2d 1171 (E.D.Wa. 1998) (witness permitted to testify as expert regarding the effectiveness of defendant's product warnings, based on his non-quantitative experience in evaluating safety warnings, decals, manuals, and instructions).

In the absence of a "reasoned explanation" requirement, one can reasonably expect legal errors regarding the reliability of experience-based expert testimony to go uncorrected.

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[7] One can reasonably expect that the 2000 amendments to Rule 702 will give rise to new areas of disagreement regarding the legal requirements imposed by the rule, and thus to new opportunities for legal error.

Must Daubert Factors Be Applied Whenever Arguably Applicable? The second Question Presented in the Petition is one that has divided the federal appellate courts. It is uncontested that Respondent's expert, Marvin Richardson, *could* have tested his theories that the Bronco II oversteers and "jacks," but that he did not do so. Whether a witness has tested his theory is one of the four principal factors cited by *Daubert* for use in determining whether the proposed expert testimony is sufficiently reliable to be admitted under Rule 702. The question that has divided the appellate courts is whether failure to test one's theory despite the feasibility of doing so is reason enough to *require* the exclusion of expert testimony regarding the theory.

Both the Fifth and Seventh Circuit have indicated that exclusion of the proffered testimony is required under those circumstances. *Black v. Food Lion, Inc.*, 171 F.3d 308, 311 (5th Cir. 1999); *Bourelle v. Crown Equip. Corp.*, 220 F.3d 532, 538 (7th Cir. 2000). The Sixth Circuit, in the decision below, disagreed. It held that a trial judge retains the discretion to admit expert testimony based on a theory that has not been tested despite the feasibility of doing so. The court held, "The district court, in its discretion, could have decided that Richardson's failure to test his theories went to the weight of his testimony regarding defects in the Bronco II, not to its admissibility." Pet. App. 8a.

The absence of a "reasoned explanation" requirement thus ends up insulating unexplained district court decisions from effective appellate review, regardless of which side of this unresolved issue of law a district court ends up coming down on. In this case, the district court was held to possess discretion to admit Richardson's testimony despite the lack of testing, even though there is no indication in the record

that the district court ever exercised such discretion; for all one can discern from the record, the district court might simply have overlooked the testing issue. Conversely, if the district court had excluded Richardson's testimony on the ground that undertaking all feasible testing is an absolute requirement for admissibility, the failure to include that explanation in the district court's decision would have insulated that decision from appellate review as well. That is true even though the Sixth Circuit indicated in its decision below that such a decision would constitute an error of law; in the absence of a "reasoned explanation" requirement, the Sixth Circuit would have no way of determining that the district court had committed an error of law.

Applicability of Daubert Factors to Nonscientific Evidence. The absence of a "reasoned explanation" requirement can insulate errors of law committed in connection with Rule 702 decisions from appellate review, even after this Court has stepped in to resolve lower-court conflicts regarding the applicable legal standard. This case provides a good example of that possibility.

Following *Daubert*, courts were in widespread disagreement regarding whether the factors cited by *Daubert* as relevant in determining the admissibility of expert scientific testimony were also relevant to other types of expert testimony. The Court resolved that issue in *Kumho Tire* by ruling that the *Daubert* factors were indeed, relevant to *all* expert testimony. *Kumho Tire*, 526 U.S. at 141. Because the district court rendered its decision in this case before *Kumho Tire* was decided, it may well have decided (in accordance with then-applicable Sixth Circuit precedent) that it was free to ignore the *Daubert* factors in determining the admissibility of Richardson's non-scientific testimony. But

we will never know whether the district court committed this error of law (and thereby abused its discretion) because the district court failed to provide a reasoned explanation for its decision.

WLF recognizes that the Court has granted considerable leeway to district courts regarding *how* to determine reliability under Rule 702. It makes no sense, for example, to require attorneys to defend the reliability of fingerprint identification methods each and every time they seek to introduce expert testimony regarding fingerprint identification. As the Court explained in *Kumho Tire,* the "abuse of discretion" standard:

> [A]pplies as much to the trial court's decisions about how to determine reliability as to its ultimate conclusion. Otherwise, the trial judge would lack the discretionary authority needed both to avoid unnecessary "reliability" proceedings in ordinary cases where the reliability of an expert's methods is properly taken for granted, and to require appropriate proceedings in the less usual or more complex cases where cause for questioning the expert's reliability arises.

Kumho Tire, 526 U.S. at 152. But requiring a district court to provide a reasoned explanation for its Rule 702 decisions would not in any way reduce its leeway regarding how to conduct Rule 702 proceedings. If a district court intends to take for granted the reliability of a well-accepted scientific methodology, it need simply say so on the record. By doing so, it has preserved the possibility of appellate review of its legal conclusions. The Court should grant review in this case in order to impose a "reasoned explanation"

requirement on Rule 702 decisions and thereby provide effective appellate review of any such decisions that are based on errors of law.

II. REVIEW IS WARRANTED BECAUSE THERE IS EVIDENCE THAT DISTRICT COURTS HAVE ABDICATED THEIR GATEKEEPING FUNCTION IN A SIGNIFICANT NUMBER OF CASES

As the Court has acknowledged, the gatekeeping task assigned to district courts by Rule 702 often can be quite burdensome. *See, e.g., Joiner,* 522 U.S. at 147-48 (Breyer, J. concurring). It would not be surprising if the difficulty in making the often-complex judgments required by Rule 702 issues might tempt some judges to abdicate their gatekeeping altogether and instead simply admit all proffered expert testimony -- trusting to juries to be able to distinguish between reliable and unreliable testimony. Imposing a "reasoned explanation" requirement would encourage trial judges to resist such temptations.

A recent study conducted by the Federal Judicial Center (FJC) suggests that federal district judges have not always adhered strictly to the Rule 702 gatekeeping requirements. The study, released last month, reported the results of surveys conducted of district judges in 1991 and again in 1998 regarding their treatment of expert testimony. Molly Treadwell Johnson, Carol Krafka, & Joe S. Cecil, EXPERT TESTIMONY IN FEDERAL CIVIL TRIALS: *A PRELIMINARY ANALYSIS* (Federal Judicial Center 2000). The surveys asked the judges to provide information about their most recent civil trial in which expert testimony was proffered. In those cases in which admissibility of the expert testimony was

disputed, the judges were asked whether they limited or excluded the testimony.

The study revealed that federal courts were far more likely to limit or exclude challenged expert testimony in 1998 than they were in 1991 (which was two years before *Daubert* was decided). In 1991, 75% of surveyed judges said that they had allowed all proffered testimony in the relevant trial; only 59% gave the same answer in response to an identical question asked in 1998. *Id.* at 4. The study concluded that federal district judges were scrutinizing the reliability of expert testimony more carefully in 1998 (after *Daubert*) than they were in 1991 (before *Daubert*). *Id.* at 1, 4.

The surprising aspect of this finding is that the 1993 *Daubert* decision adopted a standard for admitting expert testimony that was more liberal than the standard then in place in most circuits. Before *Daubert*, most circuits had adopted the "*Frye* test" (derived from *Frye v. United States*, 293 F. 1013 (1923)), under which expert opinion based on a scientific technique is inadmissible unless the technique is "generally accepted" as reliable in the relevant scientific community. *Daubert* rejected the *Frye* test, holding that it had not survived adoption of the Federal Rules of Evidence. *Daubert*, 509 U.S. at 589. In its place, the Court adopted a test for reliability under which "general acceptance" is not an absolute prerequisite but instead is one of four non-inclusive factors to be considered in judging reliability. *Id.* at 594. In other words, lower courts were instructed to adopt a less exacting standard, under which the lack of "general acceptance" of a scientific technique no longer automatically disqualifies expert testimony based on that technique from being admitted into evidence.

There is a likely explanation for district judges' increased scrutiny of expert testimony following *Daubert*'s liberalization of the standard for admitting such testimony: before 1993, many federal court's were abdicating their Rule 702 gatekeeping function, and *Daubert* served as a stern reminder of the need to perform that function faithfully. It is not possible to discern from the FJC data whether district judges have fully mended their ways and are now strictly adhering to the *Daubert/Kumho Tire* standard in all cases involving challenged expert testimony. Nonetheless, given the evidence that compliance was spotty in the recent past, the need for appellate oversight is apparent. That oversight can only be provided if district courts are required to provide a reasoned explanations for their decisions to admit or exclude proffered expert testimony. The need for oversight provides an additional rationale for granting the Petition.

CONCLUSION

The Washington Legal Foundation respectfully requests that the Court grant the petition for a writ of certiorari.

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Dated: November 1, 2000

MOTION FILED

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No. 00-497

In The

Supreme Court of the United States

FORD MOTOR COMPANY,

Petitioner,

v.

DELORES CLAY, as Administratrix of the Estate of KATHLEEN P. CLAY, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

MOTION FOR LEAVE TO FILE AMICUS BRIEF OUT OF TIME AND BRIEF OF *AMICUS CURIAE*, PRODUCT LIABILITY ADVISORY COUNCIL, INC., IN SUPPORT OF PETITIONER'S PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Whether a trial court, when ruling on a motion to exclude expert testimony under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999), and Federal Rule of Evidence 702, must make certain that the record reflects: (1) the factors that it found to be reasonable measures of the reliability of the expert testimony; (2) the grounds on which it selected those factors; and (3) how it applied those factors to determine the reliability and relevance of the expert's testimony.

MOTION FOR LEAVE TO FILE AN *AMICUS CURIAE* BRIEF OUT OF TIME

Amicus Curiae, Product Liability Advisory Council, Inc. (PLAC) respectfully moves this Court for leave to file, out of time, its Brief of *Amicus Curiae* in support of the Petition for Writ of Certiorari filed by Petitioner, Ford Motor Company. Respondents have withheld consent for the filing of this *amicus curiae* brief. As required under Supreme Court Rule 37.2(b), PLAC's Brief of *Amicus Curiae* is filed as one document with this Motion. PLAC considers the legal issues raised in the Petition for a Writ of Certiorari to be of particular importance to its members and, more broadly, to all litigants who confront issues regarding the reliability and relevancy of expert testimony in the federal courts. PLAC has submitted *amicus curiae* briefs on the merits in each of this Court's major cases addressing the standards for determining the reliability of expert opinion testimony, including *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993); *General Electric Co. v. Joiner*, 522 U.S. 136 (1997); and *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999). PLAC has submitted *amicus curiae* briefs in support of petitions for writ of certiorari in important cases, including *Subaru of Am., Inc. v. Compton*, 519 U.S. 1042 (1996), *denying cert. to*, 82 F.3d 1513 (10th Cir. 1996). PLAC has also submitted *amicus curiae* briefs in numerous other federal appellate courts and state courts of last resort concerning the appropriate standards and procedures that trial courts should employ in fulfilling their gatekeeper obligations.

Because PLAC's Brief provides information and arguments that bring to the attention of the Court relevant matter not already brought to its attention by the parties,

its participation as *amicus curiae* may be of considerable help to the Court. *See* Sup. Ct. R. 37.1.

Operating on information that turned out to be erroneous, PLAC believed that its Brief of *Amicus Curiae* could be filed as late as November 22, 2000, when in fact it was due on November 1. Upon learning of its misunderstanding on November 7, PLAC completed its brief and submits it herewith for the Court's consideration. No party will be prejudiced by permitting PLAC to file this Brief, and the acceptance of this Brief should not delay this Court in reaching its decision on the Petition.

WHEREFORE PLAC respectfully requests that the Court grant its Motion for Leave to File its Brief of *Amicus Curiae* Out of Time.

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INTEREST OF *AMICUS CURIAE*

Amicus Curiae, Product Liability Advisory Council, Inc. (PLAC) is a non-profit association with 132 corporate members representing a broad cross-section of American and international product manufacturers. These companies seek to contribute to the improvement and reform of law in the United States and elsewhere, with emphasis on the law governing the liability of manufacturers of products. PLAC's perspective is derived from the experiences of a corporate membership that spans a diverse group of industries in various facets of the manufacturing sector. Since 1983, PLAC has filed over 525 briefs as *amicus curiae* in both state and federal courts, including this Court, to present the broad perspective of product manufacturers seeking fairness and balance in the application and development of the law as it affects product liability. In addition, several hundred of the leading product liability defense attorneys in the country are sustaining (non-voting) members of PLAC. A list of PLAC's corporate members is attached as an Appendix.[1]

SUMMARY OF ARGUMENT

When ruling on a challenge to the reliability of expert testimony, a trial court must make certain that the record clearly reflects the grounds supporting its decision to

[1] Pursuant to Supreme Court Rule 37.6, PLAC states that no counsel for a party has authored this brief in whole or in part and that no person or entity other than PLAC has made a monetary contribution to the preparation or submission of this brief.

admit or exclude the expert evidence. Otherwise, the appellate court has no way to review whether the trial court abused its discretion in admitting or excluding the evidence, and it cannot discern whether the factors considered by the trial court were "reasonable measures of reliability" in the particular case, as required by *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 153 (1999). Without an adequate record, the appellate court would be forced to undertake what amounts to *de novo* review contrary to this Court's holding in *General Electric Co. v. Joiner*, 522 U.S. 136 (1997).

Importantly, the circuit courts of appeals have taken irreconcilable approaches to this issue. Some have correctly required that the trial court's record clearly reflect the grounds for the trial court's ruling, reversing and remanding the case when the record is devoid of information on which the appellate court can determine whether the trial court abused its discretion. Others, like the court below, have affirmed the trial court's ruling without being able to determine whether, in fact, the trial court applied factors that were reasonable measures of reliability in assessing the admissibility of expert testimony.

Indeed, the affirmance of a trial court's *Daubert*[2] ruling when the record fails to reveal the basis for it runs directly afoul of this Court's teachings in *Daubert*, *Joiner*, and *Kumho*. Without a record, trial courts may evade the error-correcting function of the circuit courts, escaping any determination whether the trial court's ultimate decision to admit or exclude the expert testimony was based on factors that are reasonable measures of reliability.

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[2] *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993).

Furthermore, the absence of a record reflecting the court's reasoning undermines public confidence in the judiciary in this important arena where judges fulfilling their gatekeeping roles have been challenged as playing amateur scientists. Because of the importance of this issue, which arises in a growing number of civil and criminal cases, Ford Motor Company's Petition for a Writ of Certiorari should be granted.

ARGUMENT

THIS CASE PRESENTS THE SIGNIFICANT QUESTION WHETHER THE RECORD MUST REFLECT THE GROUNDS UPON WHICH THE TRIAL COURT ADMITTED OR EXCLUDED EXPERT EVIDENCE WHICH WAS CHALLENGED AS UNRELIABLE.

This Court should grant Ford Motor Company's Petition for a Writ of Certiorari in order to determine whether the Sixth Circuit Court of Appeals erred in affirming the trial court's judgment because the trial court record does not reveal the grounds for the denial of Ford's motion to exclude the plaintiffs' expert's testimony. This is a frequent and recurring question in federal cases, particularly in product liability cases and other tort actions. A 1998 study conducted by the Federal Judicial Center shows that 45% of federal civil trials involving expert witnesses were tort actions. *See* Molly Treadway Johnson, *et al.*, Federal Jud. Ctr., EXPERT TESTIMONY IN CIVIL TRIALS: A PRELIMINARY ANALYSIS 1 (2000). Since *Daubert* was announced, challenges to expert testimony have increased dramatically, both in civil and criminal cases. Federal judges have observed a disturbing trend in expert witness testimony: high-dollar experts act as advocates

for their clients and abandon both their objectivity and their concern for providing reliable grounds for their opinions. *See id.* at 5-6. Not surprisingly, as *Daubert* issues increase in the trial courts, they also have produced many recurring, and frequently avoidable, appellate issues.

Appellate courts are struggling with how to review trial courts' decisions on *Daubert* motions, and the circuits have come to varying conclusions on several important issues. On some issues, the circuits' differing approaches can coexist, but on others – such as those addressed in this case – they cannot. The need for the trial court to make certain that the record is clear about the basis of its *Daubert* decision is critical to provide guidance to litigants and their experts and to facilitate effective appellate review. Without clear trial court findings, the circuit courts must scour the cold record in an effort to divine the trial courts' decision making process. This tempts the appellate court to perform a *de novo* review, in the guise of reviewing for an abuse of discretion. Such a result runs counter to the Court's holding in *Joiner* and *Kumho*, which commit the decision whether to admit or exclude expert testimony to the trial court's sound discretion. *See Kumho*, 526 U.S. at 152; *Joiner*, 522 U.S. at 142-47.

The importance of appropriate error-correcting appellate review over *Daubert* decisions cannot be overstated. Three times since 1997 this Court has decided cases involving the manner in which appellate courts review trial courts' *Daubert* decisions:

- In *Joiner*, the Court determined that the appropriate standard of review for the trial court's ultimate decision to admit or exclude expert testimony was abuse of discretion;

- In *Kumho*, the Court held in part that the trial court also has discretion to select the reliability factors by which it evaluates the expert testimony in a particular case so long as those factors are "reasonable measures" of the reliability of the evidence offered; and,

- Most recently in *Weisgram v. Marley Co.*, 120 S.Ct. 1011 (2000), the Court held that, when an appellate court concludes that a trial court erroneously failed to exclude inadmissible expert testimony under *Daubert*, the appellate court may direct entry of judgment as a matter of law in favor of the verdict loser if it finds that the verdict could not be sustained in the absence of the verdict winner's inadmissible evidence.

In each of these three cases, the Court unanimously resolved inter-circuit splits relating to the appropriate conduct for appellate courts addressing appeals of trial courts' *Daubert* decision. This case, too, represents an opportunity for the Court to provide much-needed guidance to trial and appellate courts alike on a recurring problem – the absence of a sufficiently detailed trial court record to facilitate proper appellate review of the trial court's performance of its gatekeeping function.

When the admission or exclusion of expert testimony under Rule 702, *Daubert*, *Joiner*, and *Kumho* is involved, PLAC submits that a trial court must make certain that the grounds for its decision are adequately preserved for the record.[3] More specifically, the trial court record must

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[3] Significantly, in all three cases in the Court's "*Daubert* Trilogy," the trial court decisions under review were fully

clearly reveal: (1) the factors that the trial court finds to be reasonable measures of the reliability of the expert testimony in question; (2) the basis for the trial court's selection of the applicable factors; and (3) how the trial court applied these factors to reach its conclusion about the reliability and relevance of the testimony in question.[4]

None of this ties the trial court's hands in deciding how to make its record. Trial courts must have some level of discretion in the manner in which they explicate their findings. *See, e.g., Ancho v. Pentek Corp.*, 157 F.3d 512, 518

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explained in detailed and well-written orders: **(1)** *Daubert v. Merrell Dow Pharms., Inc.*, 727 F. Supp. 570 (S.D. Cal. 1989), *aff'd*, 951 F.2d 1128 (9th Cir. 1991), *rev'd*, 509 U.S. 579 (1993), *on remand*, 43 F.3d 1311 (9th Cir. 1995), *cert. denied*, 516 U.S. 869 (1995); **(2)** *Joiner v. General Elec. Co.*, 864 F. Supp. 1310 (N.D. Ga. 1994), *rev'd*, 78 F.3d 524 (11th Cir. 1996), *rev'd*, 522 U.S. 136, 146 (1997); **(3)** *Carmichael v. Samyang Tires, Inc.*, 923 F. Supp. 1514 (S.D. Ala. 1996), *rev'd*, 131 F.3d 1433 (11th Cir. 1997), *rev'd*, 526 U.S. 137 (1999).

[4] PLAC is not advocating that an evidentiary hearing is required in every instance in which a motion to exclude expert testimony is made. And PLAC views the issues being addressed in this case as analytically distinct from the question whether a trial court is required to hold a "*Daubert* hearing" in a particular case. Indeed, this Court recently denied a petition for writ of certiorari addressing the question whether a trial court was required to hold a hearing before excluding expert testimony under *Daubert*. *See Kirstein v. Parks Corp.*, 159 F.3d 1065 (7th Cir. 1998), *cert. denied*, 526 U.S. 1065 (1999). In *Kirstein*, unlike this case, it was clear that the trial court had made specific written findings in deciding the *Daubert* issue. *See Kirstein v. W.M. Barr & Co.*, 983 F. Supp. 753 (N.D. Ill. 1997) (providing detailed explanation for the exclusion of the proffered expert testimony), *aff'd*, 159 F.3d 1065 (7th Cir. 1998), *cert. denied*, 526 U.S. 1065 (1999).

(7th Cir. 1998) ("Trial judges need only follow (*i.e.*, adhere to) *Daubert* when making a FED. R. EVID. 702 determination . . . ; they are not required to recite the *Daubert* standard as though it were some magical incantation."); *cf.* FED. R. EVID. 103(b). On-the-record findings are necessary not as a formalistic expression of *Daubert* as a "holy writ," *see Kumho*, 526 U.S. at 159 (Scalia, J., concurring), but as a means of allowing an appellate court to determine whether the trial court operated within reasonable bounds in admitting or excluding the testimony in question. *See id.* ("in a particular case the failure to apply one or another of them may be unreasonable, and hence an abuse of discretion.").

I. UNDER *DAUBERT* AND ITS PROGENY, THE TRIAL COURT'S DISCRETION IS LIMITED TO THE EXERCISE OF SOUND DISCRETION; DECISIONS ON *DAUBERT* MOTIONS BASED ON UNARTICULATED REASONING ARE ARBITRARY DECISIONS WHICH ABUSE THE DISCRETION OF THE COURT.

Daubert, *Joiner*, and *Kumho* have each recognized the discretionary nature of the trial court's inquiry into the reliability of proffered expert testimony. To say that the trial court has discretion simply means that there is no hard-and-fast rule. *The Styria v. Morgan*, 186 U.S. 1, 9 (1902). But trial courts must exercise *sound* discretion in accordance with what is right and equitable under the circumstances, and not act in a merely arbitrary manner. *Langnes v. Green*, 282 U.S. 531, 541 (1931). A trial court "may abuse its discretion by failing to exercise its discretion, by applying inappropriate analytical criteria, or by

exceeding the range of permissible choices." *See* Brief for the United States as *Amicus Curiae* Supporting Petitioners at 20, *in Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999) (No. 97-1709) (*citing Koon v. United States*, 518 U.S. 81, 98-100 (1996); *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 399-405 (1990)). Thus, a trial court's failure to articulate the reason for its decision on an evidentiary point may constitute an abuse of discretion, particularly when the appellate court is unable to determine the means by which the trial court arrived at its conclusion.

In varying contexts, this Court has noted the value of having an explanation provided as a means of legitimizing the decision-making process. In his concurring opinion in *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 172 (1951), Justice Frankfurter warned about dangers that lurk when public officials make decisions without any explication of their reasoning. He counseled, "[t]hat a conclusion satisfies one's private conscience does not attest to its reliability. The validity and moral authority of a conclusion largely depends on the mode by which it was reached." *Id.* (Frankfurter, J., concurring) (*cited in United States v. Long*, 574 F.2d 761, 770 n.9 (3d Cir. 1978) (Adams, J., concurring) (noting that the trial court should be required to balance probative value and prejudicial effect on the record and that "[s]uch reasoned adjudication is the cornerstone of the legitimacy of the actions of the judiciary, and an essential safeguard of the proper exercise of the trial court's broad discretion.")). At another point in his concurrence, Justice Frankfurter noted that one of three fundamental "principles of natural justice" is that " 'a party is entitled to know the reason for the decision.' " *Joint Anti-Fascist Refugee Comm.*, 341

U.S. at 170 n.17 (*quoting* United Kingdom's Report of Committee on Ministers' Powers, Cmd. 4060 at 75-80 (1936)).

Expressing a similar idea in a different context, in *United States v. Merz*, 376 U.S. 192, 198 (1964), the Court commented on the need for on-the-record findings in the context of the trial court's appointment of commissioners to resolve issues of just compensation in eminent domain proceedings. The Court observed that "[c]onclusory findings are alone not sufficient, for the commission's findings shall be accepted by the court 'unless clearly erroneous'; and conclusory findings as made in these cases are normally not reviewable by that standard, even when the District Court reads the record, for it will have no way of knowing what path the commissioners took through the maze of conflicting evidence." *Id.*

A. A Trial Court's Failure to Articulate The Grounds For Its *Daubert* Decision May Undermine Confidence in The Federal Courts.

The trial court's proper exercise of its discretion and an explanation of its reasoning are particularly important in preserving public confidence in our federal courts. As reported in a recent publication of the Carnegie Commission on Science, Technology, and Government:

> The courts' ability to handle complex science-rich cases has recently been called into question, with widespread allegations that the judicial system is increasingly unable to manage and adjudicate science and technology (S&T) issues. . . . If these claims go unanswered, or are not dealt with, confidence in the judiciary will be

> undermined as the public becomes convinced that the courts as now constituted are incapable of correctly resolving some of the most pressing legal issues of our day.

Carnegie Commission on Science, Technology, and Government, SCIENCE AND TECHNOLOGY IN JUDICIAL DECISION MAKING: CREATING OPPORTUNITIES AND MEETING CHALLENGES 11 (1993). These concerns were recently echoed in the House Science Committee's hearings regarding the establishment of a national science policy. *See Role of Science in Policy Decisions, 1998: Hearings Before the House Comm. on Science*, 105th Cong. (1998) (statement of Mark S. Frankel, Ph.D., Director, Program on Scientific Freedom, Responsibility and the Law Directorate for Science and Social Programs, American Association for the Advancement of Science). When trial courts fail properly to explicate the grounds for their decision to admit or exclude expert testimony, they may be vulnerable to allegations of arbitrary decision-making or one-sidedness. *See, e.g.*, Sheila Jasanoff, *What Judges Should Know About the Sociology of Science*, 77 JUDICATURE 77, 82 (1993) (trial courts evaluating scientific testimony "inescapably give up the role of dispassionate observer to become participants in a particular construction . . . of scientific facts."); *see also* Susan J. Becker, *Child Sexual Abuse Allegations Against Lesbian or Gay Parent in a Custody or Visitation Dispute: Battling the Overt and Insidious Bias of Experts and Judges*, 74 DENV. U. L. REV. 75, 91 (1996) ("The judge may be particularly tempted to abandon careful review of scientific principles in favor of crediting the expert's conclusions which coincide with the judge's personal beliefs."). If the record reflects the basis for the court's ruling, these criticisms

may be avoided, and the public confidence in the court may be elevated.

B. A Trial Court's Failure to Articulate the Grounds for Its *Daubert* Decision Prejudices the Litigants and Undermines the Truth-Seeking Process.

Even leaving aside the broader social ramifications, when a trial judge fails to make a sufficient record on his or her ruling on a *Daubert* issue, the litigants bear the immediate, and possibly irreparable, consequences. In trial court's application of *Daubert*, the wholesale exclusion of expert testimony is the exception rather than the rule. *See* FED. R. EVID. 702 advisory committee's note (as amended). Still, sometimes *Daubert* issues are dispositive. When critical evidence is excluded, summary judgment often is not far off. *See Daubert*, 509 U.S. at 596. And when unreliable evidence is admitted, a case ripe for judgment as a matter of law might erroneously be allowed to go to the jury, often at great cost to the party who sought unsuccessfully to exclude the evidence. *See, e.g., Weisgram*, 120 S.Ct. at 1021-22. And there are some cases where some expert testimony is excluded but the case proceeds to trial anyway. *See* Molly Treadway Johnson, *et al., supra*, at 4.

In all of these cases, litigants, their experts, and the appellate courts benefit from a clear articulation of the reasons for the trial court's decision to admit or exclude the expert testimony in question. When a trial court has decided to exclude some, but not all, of an expert's proffered testimony, or where a trial court has indicated that

the reliability issue may be revisited during trial, it is critically important that litigants and their expert witnesses understand the scope and boundaries of the trial court's decision. *See* William W. Schwarzer & Joe S. Cecil, *Management of Expert Evidence, in* REFERENCE MANUAL ON SCIENTIFIC EVIDENCE 39, 54 (2d ed. 2000). Conversely, when a trial court's decision regarding expert testimony is dispositive of a case – as it was in *Daubert, Joiner,* and *Kumho* – it is essential that the trial court explain the basis for its discretionary decision so as to facilitate appellate review.

C. Commentators And Lower Courts Have Recognized The Need For a Clear Record on These Important Evidentiary Decisions.

Commentators and some lower courts agree on the need for a good trial court record, particularly in light of *Kumho's* admonition that the trial court must select criteria that are reasonable measures of reliability when ruling on a *Daubert* motion. The new edition of the Federal Judicial Center's REFERENCE MANUAL OF SCIENTIFIC EVIDENCE advises that "[r]ulings on *in limine* motions [to exclude expert testimony] should be by written order or on the record, stating specifically the effect of the ruling and the grounds for it. The court should clearly indicate whether the ruling is final or might be revisited at trial." William W. Schwarzer & Joe S. Cecil, *Management of Expert Evidence, in* REFERENCE MANUAL ON SCIENTIFIC EVIDENCE 39, 54 (2d ed. 2000). Likewise, the most recent supplement to the late Professor Wright's treatise on federal practice states that, in light of *Kumho,* "[a] trial court should put

on the record both its conclusion concerning the application of *Daubert* and the reasoning behind that conclusion." 29 Charles Alan Wright & Victor James Gold, FEDERAL PRACTICE AND PROCEDURE § 6266 at 23 (Supp. 2000). As Professor Wright observed, "[u]nless the trial court puts on the record the factors it believes pertinent to its reliability determination in a given case, a reviewing court will have difficulty determining what those factors were." *See* Charles Alan Wright, *supra*, § 6266 at 28 n.90.2. And some circuit courts have mandated express findings and conclusions in rulings on motions to exclude experts under *Daubert* and *Kumho*. *See, e.g., Goebel v. Denver & Rio Grande W. R.R.*, 215 F.3d 1083, 1088 (10th Cir. 2000).

These authorities are in accord with a long line of circuit court authority addressing the need for on-the-record findings when a trial court is balancing probative value and the danger of unfair prejudice under Federal Rule of Evidence 403. In Rule 403 cases, several circuits have held that the trial court's record must reflect the trial court's reasoning as it engages in the balancing test required by that rule. *See Hernandez v. Cepeda*, 860 F.2d 260, 265 (7th Cir. 1988) ("Although a district court's decision to admit or exclude evidence is reviewable only for an abuse of discretion, we cannot make that determination where the court's exercise of its discretion is not apparent from the record. In some circumstances, the failure to exercise discretion may itself be an abuse of discretion."); *United States v. Robinson*, 700 F.2d 205, 213-14 (5th Cir. 1983) ("In the absence of on-the-record findings . . . we will be obliged to remand unless the factors upon which the probative value/prejudice evaluation were made are readily apparent from the record, and

there is no substantial uncertainty about the correctness of the ruling."); *United States v. Lebovitz*, 669 F.2d 894, 902 (3d Cir. 1982) (Adams, J., concurring) ("the realities of trial preclude a detailed exegesis by the trial judge of the decision to admit or exclude relevant, prejudicial evidence. But the *exercise* of a judge's discretion requires just that – exercise, application, overt action."), *cert. denied*, 456 U.S. 929 (1982); *United States v. Criden*, 648 F.2d 814, 819 (3d Cir. 1981) ("articulation of the reasons for the decision tends to provide a firm base for an appellate judgment that discretion was soundly exercised. It confines review of the exercise of discretion to its appropriate scope – *i.e.*, whether the relevant factors were considered and given appropriate weight – and discourages reversal on the ground that appellate judges might have decided differently had they been the original decisionmakers."); *United States v. Dwyer*, 539 F.2d 924, 928 (2d Cir. 1976) (reversing conviction because trial court excluded critical defense expert without explanation of its reasoning, and noting that "where the reasons for a discretionary ruling are not apparent to counsel, they will probably not be apparent to an appellate court.").

D. The Sixth Circuit's Decision Here Reveals a Misapprehension of *Daubert's* Basic Commands and Undermines, Rather than Affirms, the Trial Court's Discretion.

The Sixth Circuit Court of Appeals' decision in this case is contrary to the decisions in other circuits and the learned commentary on the rules of evidence. *Cf. Clay v. Ford Motor Co.*, 215 F.3d 663, 666 (6th Cir. 2000). Because the trial court here left no clues behind as to why it

decided to admit Richardson's testimony, the Sixth Circuit was left to speculate about what the trial court might have been thinking. Indeed, the Circuit's tentative references to the record demonstrate its uncertainty, particularly when it found that the trial court "in its discretion, *could* have decided that Richardson's failure to test his theories went to the weight of this testimony. . . . " *Clay*, 215 F.3d at 668 (emphasis added). This type of conjectural, after-the-fact analysis smacks of *de novo* review – while according discretion to the trial court's ultimate decision, the Court of Appeals injected its own analysis and balancing of the *Daubert* factors into the equation in order to achieve an outcome that supported the trial court's ultimate (though unannounced) finding of admissibility. And that, PLAC submits, is completely contrary to the letter and spirit of *Kumho*.

The Court should take this opportunity to clarify the trial court's duties to make a record concerning the manner in which it fulfilled its gatekeeping function, an issue which has become critical in many cases following the announcement of this Court's decision in *Kumho*. The continuing development of the law of expert testimony and the impact that admission or exclusion of such evidence has on the outcome of cases makes it imperative that this issue be resolved, and that trial courts be provided with clear guidance on this issue.

II. THE RECENT AMENDMENT TO RULE 702 AMPLIFIES THE NEED FOR TRIAL COURTS TO MAKE A COMPLETE RECORD OF THE FACTORS THEY CONSIDER IN RULING ON *DAUBERT* ISSUES.

The amended version of Federal Rule of Evidence 702 will become effective on December 1, 2000, absent

Congressional action to the contrary.[5] This amendment is intended to (1) respond to *Daubert, Joiner,* and *Kumho;* (2) affirm the trial court's role as gatekeeper; and (3) provide some general standards that the trial court must use to assess the reliability and helpfulness of proffered expert testimony. FED. R. EVID. 702 advisory committee's note (as amended). The Advisory Committee's note to the amended Rule 702 also suggests five specific factors in addition to the four "*Daubert* factors" that may be reasonable measures for assessing the reliability and relevance of expert testimony. These factors include:

- Whether experts are proposing to testify about matters growing naturally and directly out of research they have conducted independent of the litigation, or whether they have developed their opinions expressly for purposes of testifying.
- Whether the expert has unjustifiably extrapolated from an accepted premise to an unfounded conclusion.

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[5] As amended, Rule 702 will provide that:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

- Whether the expert has adequately accounted for obvious alternative explanations.

- Whether the expert is being as careful as he would be in his regular professional work outside his paid litigation consulting.

- Whether the field of expertise claimed by the expert is known to reach reliable results for the type of opinion the expert would give.

FED. R. EVID. 702 advisory committee's note (as amended) (citations omitted).

We know from *Daubert* and *Kumho* that the four *Daubert* factors are not a checklist and that trial courts have broad discretion to select other relevant admissibility criteria so long as they are reasonable measures of reliability. The amended version of Rule 702 complicates the *Daubert* equation. Without a clear record showing the trial court's reasoning, the appellate court must guess about which factors, out of a limitless field of criteria, the trial court actually relied on in making its *Daubert* decision. If the record is void and prevents the appellate court from performing its function, then remand is the typical remedy. But when a case has gone through a long trial and a verdict has been reached, there is a temptation to excuse the gatekeeper's lapse and let the judgment, right or wrong, stand. This temptation will only increase when appellate courts consider the wider range of factors suggested by the Advisory Committee's note to the amended Rule 702.

CONCLUSION

Ford Motor Company raises important issues in its Petition for a Writ of Certiorari. These are issues that have divided the circuit courts which reflect very different understandings of the trial court's role as gatekeeper after *Kumho*. With the amendments to Rule 702, these issues will only grow in importance and in the frequency with which they are encountered by trial and appellate courts. This Court should take the opportunity now to address the procedures to be used by trial courts in deciding whether to admit or exclude expert testimony under Rule 702, *Daubert*, and *Kumho*.

For these reasons, PLAC respectfully requests that this Court grant Ford Motor Company's Petition for a Writ of Certiorari.

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APPENDIX

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3M
Allegiance Healthcare Corporation
Altec Industries
American Home Products Corporation
American Medical Systems, Inc.
American Suzuki Motor Corporation
Andersen Corporation
Andrx Corporation
Anheuser-Busch Companies, Inc.
Appleton Papers, Inc.
Aventis Pharmaceuticals
BASF Corporation
Baxter International, Inc.
Bayer Corporation
BIC Corporation
Biomet, Inc.
Biro Manufacturing Company Inc.
Black & Decker (U.S.) Inc.
BMW of North America, Inc.
Boeing Company, The
Bombardier Recreational Products
Bridgestone/Firestone, Inc.
Briggs & Stratton Corporation
Brown and Williamson Tobacco
Brown-Forman Corporation
Budd Company, The
C.R. Bard, Inc.
Caterpillar, Inc.
Chevron Corporation
Clark Material Handling Company
Coleman Company, Inc., The
Compaq
Continental General Tire, Inc.
Cooper Tire and Rubber Company
Coors Brewing Company
Daimler Chrysler Corporation
Dana Corporation
Deere & Company
Dow Chemical Company, The
E. & J. Gallo Winery
E. I. DuPont de Nemours and Company
Eaton Corporation
Eli Lilly and Company
Emerson Electric Co.
Estee Lauder Companies
Euclid Hitachi Heavy Equipment, Inc.
Exxon Mobil Corporation
FMC Corporation
Ford Motor Company
Freightliner Corporation
Gates Corporation, The; Stant Corporation

General Electric Company
General Motors Corporation
Georgia-Pacific Corporation
Glaxo Wellcome Inc.
Global Industrial Technologies, Inc.
Goodyear Tire & Rubber Company, The
Great Dane Limited Partnership
Guidant Corporation
Harley-Davidson Motor Company
Harsco Corporation, Gas & Fluid Control Group
Heil Company, The
Henkel Corporation
Honda North America, Inc.
Hyundai Motor America
International Paper
International Truck and Engine Corporation
Isuzu Motors America, Inc.
Johnson & Johnson
Johnson Controls, Inc.
Joseph E. Seagram & Sons, Inc.
Kawasaki Motors Corp., U.S.A.
Kolcraft Enterprises, Inc.
Kraft Foods
Lucent Technologies
Mack Trucks, Inc.
Makita U.S.A., Inc.
Mazda (North America), Inc.
Medtronic Sofamor Danek, Inc.
Medtronic, Inc.
Melroe Company
Mercedes-Benz of North America, Inc.
Michelin North America, Inc.
Miller Brewing Company
Mitsubishi Motors R. & D. of America, Inc.
Monsanto Company/G.D. Searle & Co.
Motor Coach Industries International, Inc.
Niro Inc.
Nissan North America, Inc.
O.F. Mossberg & Sons, Inc.
Otis Elevator Company
PACCAR Inc.
Panasonic Company
Pentair, Inc.
Pfizer Inc.
Philip Morris Companies, Inc.
Polaris Industries, Inc.
Porsche Cars North America, Inc.
Procter & Gamble Company, The
Raymond Corporation, The
Raytheon Aircraft Company
Rheem Manufacturing
RHI Refractories America
RJ Reynolds Tobacco Company
Rover Group, Ltd.

Schindler Elevator Corporation
SCM Group USA, Inc.
Sears, Roebuck and Co.
Shell Oil Company
Sherwin-Williams Company, The
Siemens Corporation
Smith & Nephew, Inc.
Snap-on Incorporated
Solutia Inc.
Sturm, Ruger & Company, Inc.
Subaru of America
Synthes (U.S.A.)
Textron Inc.
Thomas Built Buses, Inc.
Toro Company, The
Toshiba America Incorporated
Toyota Motor Sales, USA, Inc.
TRW Inc.
UST (U.S. Tobacco)
Volkswagen of America, Inc.
Volvo Cars of North America, Inc.
Vulcan Materials Company
Whirlpool Corporation
Wilbur-Ellis Company
Wilson Trailer Company
Yamaha Motor Corporation, U.S.A.

(5)

No. 00-497

Supreme Court, U.S.
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In the Supreme Court of the United States

FORD MOTOR COMPANY, *Petitioner*,

v.

DOLORES CLAY, AS ADMINISTRATRIX OF THE ESTATE OF KATHLEEN P. CLAY, ET AL., *Respondents*.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

Respondents do not take issue with the principal contentions made in the petition. They do not deny that the issues presented in this case have the potential to arise every time the admissibility of expert testimony is challenged in federal court and are vitally important to the proper administration of Federal Rule of Evidence 702. They do not dispute that, in the Tenth Circuit, *Daubert* v. *Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), *requires* that trial courts expressly state their reasons for admitting or excluding expert testimony – and they concede that the Sixth Circuit did not require such an explanation here. They do not dispute that review for abuse of discretion, as required in *General Electric Co.* v. *Joiner*, 522 U.S. 136 (1997), is virtually impossible unless trial courts explain their admissibility determinations. Finally, they do not deny that the failure to consider a relevant and applicable *Daubert* factor that points toward inadmissibility would conflict with *Daubert* and *Kumho Tire Co.* v. *Carmichael*, 526 U.S. 137 (1999).

Because they cannot avoid making these concessions, respondents attempt simply to persuade the Court that this case is a poor vehicle for resolving the questions presented and that the circuit conflict on the first question is less developed than we contend. First, they seek to deflect attention from the fatal flaws in their expert's methodology by presenting a skewed account of other alleged evidence that they contend demonstrated Ford's liability. Second, they try to convey the impression that the district court actually (if silently) made the required reliability determination and that Ford forfeited opportunities to press its *Daubert* challenge. Third, although they do not deny that the Tenth Circuit has recognized the "absolute necessity of district court findings on the record" under *Daubert* (*Goebel* v. *Denver & Rio Grand W. R.R. Co.*, 215 F.3d 1083, 1088 (10th Cir. 2000)), they suggest that its decisions (as well as those of other circuits) do not conflict with the decision below because their precise reach is "uncertain." Br. in Opp. 21. And, fourth, respondents attack a grossly distorted version of Ford's position concerning what a district

court must do to discharge its obligation to explain its reliability determinations. When this smoke is cleared away, it is plain that this case merits review.

I. THIS CASE IS A GOOD VEHICLE FOR RESOLVING THE IMPORTANT AND RECURRING ISSUES PRESENTED

Respondents advance a variety of arguments aimed at confusing the issues or persuading the Court that this case is a poor vehicle for resolving the important and recurring issues of federal law raised in the petition. None of these arguments has merit.

a. Respondents attempt to blur the petition's focus on the shaky foundation for Richardson's opinions by describing *other* evidence that they contend supports their claims. Br. in Opp. 3-10. Although there is much to dispute in respondents' distorted characterization of the facts,[1] it is largely beside the point, because respondents' account does not come close to establishing that the district court's failure to screen Richardson's testimony was harmless error. As the court of appeals recognized (Pet. App. 4a, 18a), Richardson's testimony was an essential part of respondents' case, and Ford offered considerable evidence disputing their allegations regarding both design defect and accident causation. Because Richardson's testimony clearly mattered, a ruling that it should have been excluded indisputably would require reversal.

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[1] For example, respondents cite self-critical comments by Ford engineers concerning the Bronco II's design (Br. in Opp. 6), but they fail to disclose that these comments concerned *prototypes* of the vehicle that were never manufactured or sold. Similarly, the "J-turn" testing that respondents describe (*id.* at 6-7) involved an early prototype of the vehicle. Along the same lines, respondents' claim that only "cosmetic" changes were made to the vehicle between April 1982 and the commencement of production (*id.* at 8) is flatly inconsistent with the evidence that Ford made "real functional improvements" during that period. Pet. C.A. App. 1045.

Respondents next contend that Richardson's reliance on Ford's internal documents and developmental testing prove that his methodology was sound. Br. in Opp. 11-13. As Judge Ryan recognized, however, plaintiffs did not show that examining such materials "is a sound engineering methodology for evaluating vehicle design." Pet. App. 23a. In fact, the cited evidence plainly does not fill the gaping holes in Richardson's analysis. For example, respondents state that Richardson "criticized the Bronco II's stability index as too low" (Br. in Opp. 12) and point to evidence that Ford opted for a design having a stability index of 2.03 when an index of 2.25 might have been achieved (*id.* at 5). But Richardson was unable to say whether having the higher index would have made the vehicle safe, acknowledging that to reach that conclusion he "would have to test the final vehicle." Pet. C.A. App. 1380. Similarly, respondents point to statistics indicating that the Bronco II had a higher rollover rate than other SUVs. Br. in Opp. 3-4. However, Richardson failed to demonstrate that another type of SUV would have fared better given Slonsky's risky maneuvers in *this* accident. Pet. C.A. App. 1339-1341.[2]

Respondents also contend that both the district court and the court of appeals determined that Richardson's methodology was reliable because he relied on Ford's internal testing and documents. Br. in Opp. 10, 14, 28. In fact, as Judge Ryan correctly observed, the district court required absolutely "no evidence" that Richardson "employed recognized, reliable scientific or engineering methodology in reaching his conclusion that the Bronco II has handling and stability design defects." Pet. App. 22a. The passage of the district court's opinion cited by respondents – which addressed Ford's argument that the verdict was against the weight of the evidence

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[2] In any event, respondents confuse two issues: (1) whether Richardson's *conclusions* were based on *data* that were the result of some sort of testing; and (2) whether Richardson's *methodologies* (and theories of alternative design) *had themselves been tested*. The latter issue, not the former, is what *Daubert*'s testing factor targets.

– merely stated that, despite any weaknesses in Richardson's testimony, plaintiffs' other evidence made it "not impossible" for a jury to find in their favor. See Pet. App. 46a. As for the court of appeals, it *never* suggested that Richardson's theories had a reliable basis in testing by Ford. The majority acknowledged "Richardson's failure to test his theories" (Pet. App. 8a), and the dissenting judge stated unequivocally that Richardson "never tested his hypothesis" (*id.* at 24a).

b. As noted above, respondents cannot show that the district court ever screened Richardson's testimony under *Daubert*. Indeed, the evidence is to the contrary. According to the court of appeals, then-controlling Sixth Circuit authority would have precluded the district court from applying the *Daubert* factors when screening Richardson's testimony. See Pet. App. 5a n.3 (citing *United States* v. *Jones*, 107 F.3d 1147, 1158 (6th Cir. 1997)).[3] Indeed, respondents never suggested to the court of appeals that the district court had made a reliability determination under *Daubert*. Instead, they stated that the court found Richardson "competent to opine" in various areas of expertise and argued that "Ford's attack on plaintiffs' expert goes to the weight of his testimony, not its admissibility." Pl. C.A. Br. at 16. Whether a witness is competent or qualified to testify as a expert, of course, is distinct from whether the expert's methodology is sufficiently reliable to be admissible.

In a footnote, however, respondents now assert that the district court would not have allowed Ford to question Richardson about his areas of expertise or to maintain a continuing objection to his testimony had it believed that *Daubert* was inapplicable. Br. in Opp. 20 n.13. That assertion is nonsensical. Both a preliminary inquiry into Richardson's qualifications and cross-examination concerning the foundations

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[3] In *Jones*, the Sixth Circuit refused to extend *Daubert* "outside the scientific realm," opining that this would "turn *Daubert* * * * on its head." 107 F.3d at 1158. This Court subsequently disagreed in *Kumho Tire*. But *Jones* was on the books when the district court decided Ford's motion *in limine*.

for his opinions would have been appropriate even if *Daubert* did not apply, because they would have gone to the weight the jury should assign to his testimony.

c. Respondents repeatedly imply that Ford forfeited its opportunities to challenge the reliability of Richardson's testimony in the district court. Br. in Opp. 1, 13-14. As the opinion below makes clear, however, Ford properly raised and preserved its *Daubert* challenge. See, *e.g.*, Pet. App. 5a ("Ford's motion *in limine* squarely raised the issue of reliability").

Respondents fault Ford for "delay[ing]" its challenge to the admissibility of Richardson's testimony until the week before trial. Br. in Opp. 13. But Ford filed its motion *in limine* on the same day that the parties filed all such motions – some of which were granted by the district court. Pet. C.A. App. 10-11, 15. Whether or not the court was justified in denying Ford a pretrial hearing, it remained obligated to screen Richardson's testimony under *Daubert*. Respondents do not seriously dispute this.

Respondents also criticize Ford for declining to conduct a voir dire of Richardson, electing instead to question him only on cross-examination. Br. in Opp. 14, 24. Here again, the suggestion that Ford was less than diligent in raising or preserving its *Daubert* challenge is unfounded. The district court's offer to allow Ford to conduct voir dire was limited to questions concerning Richardson's general qualifications. See Pet. App. 32a (court notes that plaintiffs had "asked to qualify [Richardson] generally" in mechanical engineering, machine design, vehicle dynamics, and accident reconstruction, and states, "[i]f you want to question him about that generally, fine"). The court agreed with Ford that questions concerning the bases for Richardson's opinions should be raised during cross-examination. See *ibid.* ("It seems to me that the kind of questioning you want to do would be best reserved for your cross-examination."). Ford's counsel proceeded to cross-examine Richardson in detail on issues relating to the reliability of his opinions (Pet. C.A. App. 1257-1388), yet the court

summarily overruled Ford's subsequent motion to strike Richardson's testimony. Pet. App. 34a.

There is thus no question that this case is a proper vehicle for resolving the conflict between the Sixth Circuit's decision and those of other circuits, as well as the tensions between the decision below and the framework established by *Daubert*, *Kumho*, and *Joiner*.

II. THE DECISION BELOW CONFLICTS WITH DECISIONS OF THIS COURT AND OF OTHER CIRCUITS

The petition demonstrates that the Seventh, Tenth and Eleventh Circuits – in conflict with the Sixth Circuit – require trial courts to explain on the record their decisions to admit or exclude expert testimony under Rule 702 and *Daubert*. In attempting to rebut this showing, respondents suggest that the precise requirements imposed on the trial judge by these rulings are somewhat uncertain, and that the petition advocates a more stringent rule than the cases support. There is no question, however, that the reasonable rule adopted by the Tenth Circuit, which the petition supports, is flatly inconsistent with the Sixth Circuit's holding. Moreover, respondents do not even attempt to refute the other conflicts that the petition identifies – including conflicts with this Court's own decisions.

a. Seeking to rebut our showing of a circuit conflict concerning the need for trial courts to explain their admissibility determinations, respondents first contend that "the circuit courts agree that * * * a district court must ensure that there is a 'sufficiently developed record' to demonstrate that it performed its gatekeeping function." Br. in Opp. 21 (quoting *Goebel*, 215 F.3d at 1088). But, in this case, the Sixth Circuit considered "sufficiently developed" a record in which objections under *Daubert* were "squarely raised," and the trial court did nothing but "rule[] on the motions and objections" that challenged the testimony. Pet. App. 5a. By contrast, the Tenth Circuit has declared itself "convince[d]" of the "absolute necessity of

district court findings on the record" concerning the relevance and reliability of expert testimony. *Goebel*, 215 F.3d at 1088.[4]

Respondents next contend that the Tenth Circuit's decisions should be discounted because "the reach of its holding is uncertain." Br. in Opp. 21. In fact, the law in the Tenth Circuit is quite definitive. Aside from declaring the "absolute necessity" of explicit findings, the Tenth Circuit has *twice* ruled that the failure to make such findings before admitting expert testimony mandates reversal and a new trial. See *ibid.*; *United States* v. *Velarde*, 214 F.3d 1204 (10th Cir. 2000). That rule undoubtedly would have required reversal here. The conflict between the Sixth and Tenth Circuits is undeniable.

Respondents next attempt to distinguish *Goebel* on its facts, contending that this case departs from *Goebel* because "the reliability determination here is apparent from the record." Br. in Opp. 22 n.14. However, this case is virtually identical to *Goebel*. In *Goebel*, the district court denied a pre-trial motion to exclude expert testimony without any statement on the record of its reasons (215 F.3d at 1087); denied defendants' motion at trial to exclude the testimony "'on the basis of *Daubert*'" on the ground that the court "believe[d] there is sufficient foundation here for the jury to hear this testimony" (*ibid.*) (citations omitted); and denied a post-trial motion to strike the expert's testimony and enter judgment on the ground that "'the issue was raised by motion *in limine* and the court fully considered the matter when it denied that motion'" (*ibid.*) (citation omitted). The district court's treatment of the *Daubert* issue in this case

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[4] Respondents also insist that the decision below "expresses no opinion as to the extent to which a district court must document its *Daubert* analysis on the record." Br. in Opp. 23. But the Sixth Circuit expressly opined on that issue when it concluded that the district court had satisfied its obligations under *Daubert* despite the fact that it "did not explicitly recite that Richardson's testimony was relevant and reliable." Pet. App. 5a. The Sixth Circuit thus was unwilling to impose on district courts *even the minimal requirement* that they state their overall conclusions concerning reliability and relevance.

was indistinguishable; if anything, the court here said *even less* about its reasons for admitting the challenged testimony. Yet, while the Tenth Circuit reversed and ordered a new trial, the Sixth Circuit inferred from silence that the district court must have "determined Richardson's testimony was relevant and reliable." Pet. App. 5a.[5]

Respondents next contend that "none of the other circuits has stated the extent to which the district court must document its gatekeeping analysis in order to survive appellate review." Br. in Opp. 23. But any uncertainty about the precise contours of the findings required by *Daubert* makes this case more, not less, worthy of review.

Equally unavailing are respondents' efforts to minimize the conflict between the decision below and decisions of the Seventh and Eleventh Circuits. Citing *Ancho* v. *Pentek Corp.*, 157 F.3d 512, 517 (7th Cir. 1998), respondents first suggest (Br. in Opp. 23) that the Seventh Circuit requires only a minimal showing that the trial court made a reliability determination. But in *Ancho*, the district court *excluded* the challenged expert testimony, ruling that there was not "a prayer" of the expert "overcoming the bar" set by *Daubert*, and listing several specific ways in which the proffered testimony fell short. 157 F.3d at 516. Thus, the Seventh Circuit had ample basis – obviously far more than the court of appeals had here – for concluding that the district court had satisfied its gatekeeping obligation.

Finally, although respondents insist that the Eleventh Circuit has merely "encouraged" findings to facilitate appellate

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[5] *Velarde*, which respondents make no effort to distinguish, is equally at odds with the decision below. In *Velarde*, the district court denied plaintiffs' request for a *Daubert* hearing concerning the testimony of defendants' expert on the ground that the testimony was not "'new or novel.'" 214 F.3d at 1208 (citation omitted). Reversing and ordering a new trial, the Tenth Circuit stated that "*Kumho* and *Daubert* make it clear that the court must, on the record, make *some* kind of reliability determination." *Id.* at 1209 (emphasis in original).

review (Br. in Opp. 23), they do not dispute our showing (Pet. 18) that district courts in the Eleventh Circuit believe they are required "to make findings of fact pertinent to and that justify the non-admissibility of [expert] testimony." *Shepherd* v. *Michelin Tire Co.*, 6 F. Supp. 2d 1307, 1309 (N.D. Ala. 1997) (citing *United States* v. *Lee*, 25 F.3d 997, 999 (11th Cir. 1994)).

b. To distract attention from the clear circuit conflict identified in the petition, respondents first caricature the rule that Ford supports and then argue that it is inconsistent with *Daubert* and *Kumho Tire*. According to respondents, Ford advocates "a formalistic and mechanical analysis of each of the *Daubert* factors" – a "checklist" that they contend will "compel numerous reversals for purely technical 'errors.'" Br. in Opp. 26. To support their portrayal of Ford's views, they selectively quote (*id.* at 25) a passage of the petition that describes aspects of the *Daubert* analysis, but delete the words indicating that a court "may" have to conduct the various steps of the inquiry in a particular case.

Respondents' transparent effort to distort Ford's position is easily rebutted. The petition, like the decisions of the Tenth Circuit, supports a straightforward rule requiring trial courts to "state their reasons for admitting or excluding expert testimony." Pet. 19. That rule would be as flexible as *Daubert* itself. Thus, if a court finds in a particular case that "the reliability of an expert's methods is properly taken for granted" (*Kumho Tire*, 526 U.S. at 152), it need only say that. In "the less usual or more complex cases where cause for questioning the expert's reliability arises" (*ibid.*), a more detailed statement of reasons would likely be required. Insisting that a trial court provide such an explanation would add little to the burden of conducting the *Daubert* inquiry itself, but would enable the courts of appeals to conduct the abuse of discretion review that this Court mandated in *Joiner*.

c. Respondents also fail to refute the existence of the other significant conflicts identified in the petition. As we explained in the petition (at 25-27), the Sixth Circuit went into conflict

with *Kumho Tire*, as well as with decisions of other circuits, when it ruled that "the district court, in its discretion, could have decided that Richardson's failure to test his theories went to the *weight* of his testimony regarding defects in the Bronco II, *not to its admissibility.*" Pet. App. 8a (emphasis added). As we noted, that statement converts the district court's discretion to decide "how to go about determining whether particular expert testimony is reliable" (*Kumho Tire*, 526 U.S. at 152) into a license to ignore *Daubert* altogether. It also ignores this Court's statement in *Kumho Tire* that a court "*should consider* the specific factors identified in *Daubert* where they are reasonable measures of the reliability of expert testimony." *Ibid.* (emphasis added). By indicating that a trial court is free to ignore the fact that an expert's methodology is untested, the Sixth Circuit's ruling also conflicts with decisions of other circuits, which have recognized the vital importance of *Daubert*'s testing factor in the context of engineering testimony concerning products defects. See Pet. 26-27.

Respondents apparently do not dispute that a court's failure to consider a relevant and applicable *Daubert* factor in favor of allowing the jury to weigh the evidence would impermissibly "yield[] a judicial determination to the jury." Br. in Opp. 28. Nor do they deny the importance of the testing factor. Instead, they argue that both the district court and the court of appeals believed that Richardson's reliance on Ford testing was an adequate substitute for a showing that his own methodology (and alternative designs) had been tested and shown to be reliable. *Ibid.* As explained above, however, neither court considered *Daubert*'s testing factor to have been satisfied by Richardson's references to Ford's testing data. See pages 3-4, *supra.* As Judge Ryan explained in dissent (Pet. App. 24a), the Sixth Circuit's statement that the district court could ignore "Richardson's failure to test his theories" is thus a plainly erroneous holding that should be reviewed by this Court.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted.

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